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THE EVOLUTION OF THE LAW OF BLASPHEMY.

I.

PROSECUTIONS for the crime of blasphemy are rare. But one which took place recently in London has elicited from the Home Secretary an utterance which is of interest and of importance.

At the Central Criminal Court in December last a man named Gott was indicted for having hawked and sold in a London thoroughfare some pamphlets containing coarse and scurrilous ridicule of some of the narratives in the Four Gospels. The first jury disagreed; but on the second trial (which I witnessed) he was convicted. It being his fourth similar conviction, he was sentenced to nine months' imprisonment with hard labour. The Court of Criminal Appeal confirmed both the conviction and the sentence (16 Cr. App. R. 87). On a petition being made for a remission of the sentence, the Home Secretary pointed out the two-fold form—judiciary and statutory—of the English law against blasphemy. It was not under any statute but under the common law that Gott had been indicted. The Home Secretary (Mr. Shortt) wrote that "The common law does not interfere with the free expression of *bona fide* opinion. But it prohibits, and renders punishable as a misdemeanour, the use of coarse and scurrilous ridicule on subjects which are sacred to most people in this country. Mr. Shortt could not support any proposal for an alteration of the common law which would permit such outrages on the feelings of others as those of which Gott was found to be guilty." But, as to the statutory law, he added that "The Blasphemy Acts were intended to restrict freedom of religious opinion or its expression; and Mr. Shortt

is of opinion that those Acts may well be repealed. They are already obsolete."

II.

Gott's conviction, then, had been at common law. What is the common law on this subject? Its singular history affords a striking picture. Mr. Justice Stephen, as all readers of his "Digest" and his "History" know, thought the conflict of legal authorities on this matter to be so great that Parliament ought to interpose to settle the question. Since his death it has been settled; not indeed by Parliament, but in the House of Lords—by the opinion of a Court consisting of Lords Finlay, Dunedin, Parker, Sumner, and Buckmaster. Though not agreed upon the main point that happened to be before them, they were unanimous on this long-disputed one. A similar unanimity upon it had been shown in the Court of Appeal by all the Judges before whom the case had been heard there.

The common law on this subject has thus reached at last a position satisfactory—or almost satisfactory (as I shall ultimately prefer to say). But it has reached it through an evolution so curious as to be worth reviewing.

For some generations past it had been a question disputed amongst lawyers whether the common law rendered punishable *all* open expressions of a disbelief in Christianity, or only such as were couched in language so irreverent and scurrilous as to be likely to offend ordinary Christians deeply enough to provoke some of them to a breach of the peace. To put it briefly, could the mere Matter of an expression of disbelief constitute it an offence of criminal blasphemy, or would the offence arise only when the Matter was aggravated by the Manner?

The former and severer view seemed to be established, if not by any actual decision, yet certainly by a chain of unchallenged *obiter dicta* continuing throughout more than a century down into the reign of Queen Victoria. As Stephen says (History C. L. II, 475), in the convictions for blasphemy throughout that period the Bench usually laid down "the plain principle that the public importance of the Christian religion is so great that no one is to be allowed to deny its truth." If that principle be accepted, the results are grave indeed. For then (as Stephen elsewhere says) Strauss's *Leben Jesu*, Renan's *Vie de Jésus*, and the works of Auguste Comte—and, we might to-day add, all average numbers of the *Hibbert Journal*—would be blasphemous libels; "and every bookseller who sells a copy, every librarian

who lets one out to hire, nay, every owner of a copy who lends it to a friend, is liable to fine and imprisonment." Similarly, we may add, the purchaser of a copy could not be compelled to pay its price; and the printer who set its pages up in type could not enforce payment of his wages.

Let us trace this branch of law from its commencement. The first indictment for blasphemy belongs to the lax period when, after the fall of the Commonwealth, the Restoration of Charles II was followed by outbursts of disorderly licence. The misdoings that had formerly been checked by the Star Chamber and by the Ecclesiastical Courts had now lost those restraints. The former tribunal had been abolished before the death of Charles I; and the Courts Spiritual had suffered under Cromwell a paralysis from which they had not fully recovered. Hence the offences which under the monarchy these tribunals alone had punished gained, on the eclipse of Puritanism, a sudden freedom. In 1663 the dramatist Sir Charles Sedley and a group of his aristocratic boon-companions exhibited themselves naked on the balcony of a tavern of ill-fame in Covent Garden, before a crowd of several hundred persons. They proceeded to gestures and acts so gross that the crowd stoned them from the balcony and that even the laxest editors of Pepys' Diary have not dared to print his description of the scene. Yet the general opinion was, as Pepys regretfully records, that there no longer existed any authority that could legally repress such outrages on public decency. But under Foster L.C.J. the Court of King's Bench, by a bold innovation, promptly created one (17 St. Tr., 155); so Sedley, on being indicted, was fined £500. Thirteen years later the same tribunal, under the presidency of Sir Matthew Hale, by a cognate innovation, recognized blasphemy as a crime punishable in Courts of common law. The decision was important enough to attract the attention of two reporters (1 Ventris, 293; 3 Keble, 607). A man named Taylor had uttered orally many highly offensive words against religion, words so wildly violent as to suggest doubts of his sanity. He was fined by the King's Bench, and ordered to be pilloried thrice, and to find sureties for his good behaviour throughout his life. Sir Matthew Hale, who presided, emphatically asserted the jurisdiction of the secular Courts; saying "Contumelious reproaches of God or of the religion established are punishable here. . . . The Christian religion is a part of the law itself." And as to the particular case before him, Ventris records him as saying that "*Such kind*"—observe the limitation—"of wicked blasphemies are . . . a crime against the laws, State,

and government, and therefore punishable in this Court. . . . Christianity is parcel of the laws of England."

A permanent legal doctrine was thus created. The maxim from which it was deduced—that "Christianity is part of the law of England"—acquired a currency which lasted to our own day. It was a sweeping statement; for, as Lord Cranworth said, none of us have ever seen a man indicted in a Court of law for not loving his neighbour as himself. Whence had Hale derived it?

There was an important law book, Sir Henry Finch's famous *Common Law*, which for sixty years past had been in the hands of all lawyers, and which remained for a century and a half the principal manual of our legal system until Blackstone superseded it. Now Finch says (I. 3.) that "Holy Scripture is of sovereign authority. . . . To such laws as have warrant in Holy Scripture our law giveth credence." From whom did he draw this proposition? He quotes it as from Prisot, an expert lawyer who helped Littleton to write his *Tenures* and who in 1449 became Chief Justice of the Common Pleas. This quotation brings us to one of the most surprising and most enduring of all legal misapprehensions—one which vividly enforces Principal Routh's old warning, "Verify your references"; and shows how meticulous a precision ought to be observed by every lawyer in citing each single word of any authority that he relies upon. Finch does give, in his margin, Prisot's actual words; but he misunderstands and mistranslates them. The misunderstanding was first detected, so far as I am aware, not by any English lawyer, but by an American one, less known to us, indeed, as lawyer than as statesman—the acute and brilliant President Jefferson.[1] Prisot was dealing in 1458 with an action of *Quare Impedit* (reported in Y. B. 34 Hen. VI. fo. 38) brought by one Humphry Bohun, who claimed to be patron of a benefice then vacant, and had accordingly presented a priest to the Bishop of Lincoln for institution. But on the very same day another claimant of the same advowson had presented another priest to that Bishop. Bohun accordingly sued the Bishop and the rival claimant and the rival priest. The Bishop's defence was that "The law of Holy Church is that in such a case [*i.e.*, of conflicting claims of patronage] no Bishop is bound to admit either presentee until the disputed right of patronage has been judicially ascertained. And the Bishop is not bound to ascertain it." This was a doctrine doubly advantageous to the

[1] Judge Story's political animosity to Jefferson led him to treat the detection without his accustomed fairness (Life I, 431).

Bishop; not merely because it saved him trouble, but also because, if the two patrons were left to fight it out between themselves, their fight would probably be protracted beyond the first six months of the vacancy, and thereupon the right of presentation would lapse to the Bishop himself. In this case that half-year had expired; and the Bishop had asserted (and actually exercised) his right of presentation. The secular Court had now to determine whether this convenient ecclesiastical doctrine was one which they in the Common Pleas were bound to recognize and enforce. By what method were they to ascertain that it really was valid ecclesiastical law? By the oral testimony of doctors of canon law? Or how otherwise? As Prisot lucidly put it—"The point is, whether the law of the Church is as the Bishop says, or not. For if their law is so, we wish to accept it." Then, later on, he suggests the proper method. "To such laws as they of Holy Church have in ancient writing [*en auncient scriptur*] it is right for us to give credence. For that is common law, on which all manner of laws are founded" (fo. 40).

This is very much what Lord Denman said, just four hundred years later, in *Bishop Hampden's Case* (17 L. J. R., Q. B., at p. 268)—"The canon law forms no part of the common law of this realm unless practice can be shown to the contrary." Of such practice "ancient writing" would be an appropriate proof. To it, not to the Bible, Prisot must have intended to refer. He would not have spoken of the sacred volume by so mean a title as "ancient Scripture." Nor would he have thought it possible to find in the Bible rules concerning benefices and advowsons. But Finch's misunderstanding of him took root and flourished. When annotating Blackstone, Prof. Christian (whose preface admits his habit of not verifying quotations) boldly inserted Prisot's words, "Scripture est common ley" (without adding the qualifying "auncient"), as a basis for the law of blasphemy. And in that mutilated form the quotation survived in Stephen's *Commentaries* until late in Queen Victoria's reign. Prisot's words, in their full form, were indeed quoted, as if relevant, by Lord Sumner, even in 1917 (A. C., at p. 455).

Sir M. Hale, as we have seen, established a stringent judiciary law against blasphemy. Yet, stringent though it was, it was not severe enough to satisfy the indignation that was aroused by the devout and philanthropic Thomas Firmin's widespread dissemination of pamphlets controverting the doctrine of the Trinity. The Trinitarian dissenters and even the House of Commons addressed the Crown upon the matter. One result was the issue of that Royal Proclamation against vice and

profanity which the older amongst us used to hear read at assizes and sessions. A more potent result was the enactment of the statute 9 & 10 Will. III, c. 32; which made it a criminal offence (1) to maintain, either in writing or in advised speaking, that there are more Gods than one, or (2) to deny, in similar manner, the doctrine of the Trinity or the truth of the Christian religion, or the divine authority of the Scriptures; provided that the offender had been educated in Christianity or had made profession of it. This proviso was introduced avowedly to protect the Jews; who, during the brief period that had elapsed since Cromwell had readmitted them to the realm, had become already an important factor in the commercial world. The penalties imposed by the Act were, however, not those of the ordinary criminal law. The first conviction merely rendered the offender incapable of holding any public office or employment. But a second conviction disqualified him permanently from buying land or receiving a legacy or bringing an action; and exposed him to three years' imprisonment. It will be noticed that the Statute punishes every deliberate avowal of the forbidden opinions, "even in the most private intercourse" (3 B. & Ald., at p. 161), however reverently it be expressed, and though it involve no attempt to proselytise.

The Statute remains unrepealed; but it is a remarkable fact that no criminal prosecution has ever taken place under it. The threat of one, however, very soon after its enactment, secured the destruction of an entire edition of a book written by Servetus, whom Calvin burned at Geneva for his heresy concerning the doctrine of the Trinity. The particular clause in the Statute which punished denials of that doctrine was repealed in 1813 by 53 Geo. III, c. 160. Yet a few years afterwards, in the celebrated case of *Lady Hewley's Charities* (9 Cl. & F. 355), the fact that from 1698 to 1813 any deliberate expression of Unitarian opinions was clearly a statutory offence (if not also a common law one) was recognized as one of the causes which had in that period rendered illegal the establishment of any chapels or charities that were, or that could become, distinctively Unitarian. Hence, early in the nineteenth century, the Trinitarian Nonconformists organised an effort to eject the Unitarian holders of all such old chapels and charities. The effort succeeded in the case of Lady Hewley's wealthy endowment; but was thenceforward checked by an Act of 1844 (7 & 8 Vict. c. 45), memorable as having been supported by all the leaders of both political parties and as having elicited from Macaulay and from Gladstone two of their ablest speeches.

Since that time the Act of Wm. III has never, I believe, been brought into any practical operation. But the judiciary law pursued an active course. Half a century after *Taylor's Case*, the doctrine laid down by it was confirmed by a Court in banco. Mr. Woolston, a fellow of Sidney College, Cambridge, resident there for many years, published a singular series of works which assailed in very coarse and offensive manner many of the Biblical narratives, including those of the miracles of Christ. He insisted that he was contradicting their historical correctness merely in order to insist that they were, in reality, only allegorical representations of important religious truths. That this was an insincere statement, put forth merely as a blind, is the opinion maintained by Strauss, in the unfamiliar company of Abp. Trench. But that it was, on the other hand, a sincere conviction, entertained by a man of unbalanced mind, is the opinion of Dr. Blake Odgers and of a once-famous Cambridge Professor of Divinity, Dr. Hey. The latter says: "When I think of Woolston I feel more compassion than indignation. He was a man of learning and probity . . . nay, of wit and humour . . . of great intellectual abilities and attainments" (*Divinity Lectures*, ed. 1796, I. 195, IV. 57). An interesting psychological question is thus raised.

As Hey's words may well suggest, Woolston's works had an enormous sale. Dean Swift depicts it vividly:—

> "Here's Woolston's tracts, the twelfth edition;
> They're read by every politician;
> The country Members, when in town,
> To all their boroughs send them down.
> You never read a thing so smart,
> The courtiers have them all by heart."

Woolston was tried in 1729, and convicted. The King's Bench refused to grant a new trial. Its decision attracted the attention of three reporters (Fitzgibbon, 64; 2 Strange, 832; 1 Barnardiston, 162, 266). The defendant was fined, sent to prison for a year, and ordered to remain there until he could find sureties for his good behaviour throughout life. He never found them.

Proceeding upon the authority of *Taylor's Case*, the Court said that the Christian religion is established in this country, and therefore they "would not allow any books to be writ which would tend to alter that establishment." "They would not suffer it to be debated whether to write against Christianity *in general* was not . . . punishable at common law." Raymond L.C.J. laid it down that "Christianity *in general* is

parcel of the common law of England; and therefore to be protected by it." "We do not," he said, "meddle with any differences in opinion; we interpose only when the very root of Christianity itself is struck at; as it plainly is by this allegorical scheme." The Court "desired it might be taken notice of, that they laid their stress upon the word 'general'; and did not intend to include disputes between learned men upon particular controverted points." A difficult problem, still unsettled, was thus raised—where shall the line be drawn between the doctrines so fundamental as to be part of the "very root" of Christianity, and those which, by forming no essential part of "Christianity in general," are matter for uncontrolled controversy? To which class (for instance) the doctrine of the Trinity is to be referred is a question. Upon it the Judges who in 1842 had to deal with it practically, in the case of *Lady Hewley's Charities* (*Shore* v. *Wilson*, 9 Cl. & F. 355), took, strange to say, a laxer view than approved itself in more recent days to two of the law lords who in 1917 decided *Bowman's Case* (pp. 433, 476). Woolston's language had been scurrilous and contumelious, like that of Taylor; and thus fell clearly within the condemnation pronounced by Sir Matthew Hale upon Taylor. But it will be seen that his Judges did not base their decision upon this, but laid down a general prohibition of attacks upon Christianity, irrespectively of the way in which they were expressed—a prohibition not merely of the Manner but of the Matter. This extreme view many subsequent Judges, even in our own lifetime, regarded as settled law; though no case ever turned upon it, and its authority was only that conferred by a long chain of *obiter dicta*.

The common-law offence of Blasphemy formed the subject of many prosecutions during the disturbed period of 1790-1830; several of them being directed against Paine's famous book, *The Age of Reason*, a book so influential that it provoked forty different works in reply. The most conspicuous prosecution was that of Williams in 1797, conducted for the Crown by Lord Erskine, who preferred his speech in it to even the greatest of his other forensic addresses. It was at this trial, too, that Lord Kenyon, whose literary attainments were but limited, fell into his famous blunder (26 St. Tr. 653) of re-naming Julian the Apostate as "Apologist" or—if we may trust the poet Coleridge's account—as "Apostle."[2] Throughout the long line of those prosecutions the authority of *Woolston's Case* was relied

[2] "The Emperor Julian, so celebrated for every Christian virtue that he was called 'Julian the Apostle'"; (Allsop's Letters of S. T. Coleridge, p. 53).

on; though the *dicta* in it extended—like the Statute of 1698—to all denials of Christianity, however inoffensively expressed.

Hence Lord Macaulay protested, in a Parliamentary speech of 1833, that "It is monstrous to see any Judge try a man for blasphemy under the present law. Every man ought to be at liberty to discuss the evidences of religion." "But," he added, "no man ought to be at liberty to force, upon *unwilling* ears and eyes, sounds and sights which must cause irritation. . . . If I were a Judge in India, I should have no scruple about punishing a Christian who should pollute a mosque" (*Speeches*, p. 116). Accordingly, when Macaulay did become a legislator in India his code embodied an enactment (s. 298) making it an offence punishable with a year's imprisonment to utter any word or make any sound in the hearing of a person, or make any gesture or place any object in the sight of a person, with the deliberate intention of wounding that person's religious feelings.[3]

In 1841 the Commissioners on Criminal Law, in the Sixth of their learned and elaborate Reports, laid it down that "The law distinctly forbids *all* denial of the Christian religion." But they added that in actual practice "the course has been to withhold the application of the penal law unless insulting language is used."

In 1850 there occurred, however, in actual practice an extraordinary instance of the application of the law to a case where no shadow of insult was present. In *Briggs* v. *Hartley* (19 L. J. R., Ch. 416) a testator had bequeathed money as a prize for the best essay on Natural Theology "demonstrating the sufficiency of Natural Theology . . . to constitute a true perfect and philosophical system of universal religion." Mr. Bethell (afterwards Lord Westbury) argued against the validity of the bequest, "on the ground of its tendency to demoralise society . . . and to create ill-effects upon the constitution of this country." Accordingly, Shadwell V.C. declared that the bequest must fail, saying: "I cannot conceive that it is at all consistent with Christianity." It is not obvious how that conception involves much difficulty. The decision is explicable only as an instance of Bethell's influence; for of Shadwell's "complete subjection to Bethell, the leader of his Court, many stories are told" (*Dict. Nat. Biog.*). Fifty-five years ago, in an essay on this head of our criminal law (*Theological Review*,

[3] Mr. Gour, an Indian commentator on this Code, remarks gravely that "The wounding of feelings must be more than sentimental; which is easy to acquire if it costs nothing."

1867, p. 216), I mentioned the difficulty of maintaining the Vice-Chancellor's reasoning, in face of the universal approval that had been already given by the religious world to the series of *Bridgewater Treatises* (1833-1840), which a kindred bequest had produced. I am glad to have lived to see his decision discredited by Lord Cozens-Hardy and by the present Master of the Rolls (L. R., [1915] 2 Ch., 463, 467).

Yet already a more tolerant theory of the criminal law was making itself felt; a feeling that, as all the convictions had been in cases of scurrilous language, those judicial utterances which declared that blasphemy might be indictable even where there was no scurrility were nothing more than *obiter dicta*. Thus as early as 1812 a voice which proved to be far-reaching had been raised in protest. Mr. Starkie (afterwards Downing Professor of Law at Cambridge) was the author of what became for a whole generation, on both sides of the Atlantic, the accepted text-books on the Law of Evidence and on the Law of Libel. In the latter he said, in words often subsequently quoted, "The law visits not the honest errors, but the malice, of mankind." Hence he urged that the penalties of blasphemy should be limited to cases where the offender intended either to insult sacred subjects by contumelious language or to mislead his readers by wilful misrepresentation. He was in full accord with the spirit of Bishop Jeremy Taylor's somewhat over-graphic words: "You may as well cure the colic by brushing the man's clothes, or fill his belly by a syllogism, as prosecute him for Blasphemy. The blasphemer may be provoked into confidence and vexed into resoluteness. So, instead of erecting a trophy to God, you build a monument to the Devil" (*Liberty of Prophesying*, § xiii., 19).

Accordingly, when the Chartist movement, in the early years of Queen Victoria's reign, was accompanied by the publication of much irreligious literature, Lord Denman ruled, on Hetherington's trial for blasphemy (4 St. Tr. (N. S.) 590), that the question of criminality lies "not altogether on the matter of opinion, but is in a great degree a question as to tone and style and spirit." Hetherington was sentenced to four months' imprisonment. His case had a curious sequel. Realizing that all the prosecutions of the past half-century had been levelled against humble vendors of cheap and popular books, he desired to see how far the law would be enforced against the prosperous vendors of expensive literature. He accordingly prosecuted a leading publisher, named Moxon, for issuing an edition of Shelley's complete works. The trial was rendered remarkable by the extraordinary eloquence of the speech by which Serjeant

Talfourd—more eminent as a man of letters than as a lawyer—defended Moxon; a speech as eloquent and as ineffective as that defence of Peltier which won for Sir James Mackintosh a European fame. Talfourd's line of defence was that, although the works of Shelley did contain some censurable passages, the publication of those works in their entirety, so as to show completely the development of a great poet's mind, was desirable "in the cause of genius, the cause of learning, the cause of history, the cause of thought." But the presiding Judge (Denman L.C.J.) replied that if there was nothing in the context to neutralize the indictable passages, they would remain indictable. The jury promptly convicted Moxon. But no sentence was ever passed on him, as Hetherington dropped the prosecution upon being paid his costs by Moxon.

In 1857 came the trial for blasphemy of Pooley, a half-insane labourer, whose conviction aroused the protests of Buckle and J. S. Mill. Coleridge J., in his summing-up, adopted as law Prof. Starkie's moderate view of the legal rule. The prosecuting counsel in this case was the future Lord Chief Justice Coleridge, destined to play, a quarter of a century later, a very different part in the development of this branch of criminal law.

In our distant colonies the prohibition of blasphemy was retained. In New South Wales (February 18, 1871) a man named Jones was sentenced for that offence to a fine of £100 and two years' imprisonment. In New Zealand no prosecution for it occurred until the present year, when the editor of a newspaper was indicted for publishing a scurrilous poem by Mr. Siegfried Sassoon concerning Good Friday. He was acquitted (*Rex* v. *Glover, The Times* of February 24, 1922). Hosking J., said: "The law of blasphemous libel is not intended to enforce religious doctrine, but to maintain peace and order in the community and enforce respect for things sacred, and to prevent the bitter feelings and breaches of the peace which might arise from malicious desecration."

After a quarter of a century had elapsed without any prosecution in England (or probably in the United Kingdom) for blasphemy, there came a great turning-point in this evolution of judiciary law. In December, 1882, two men, named Foote and Ramsay, the publishers of a weekly paper containing hideously offensive caricatures—literary and pictorial—of religion, were convicted before North J., and imprisoned. In the following April they were again prosecuted before Coleridge L.C.J., who delivered a judgment of remarkable eloquence, in which he expressed dissent from the many *dicta* which had declared it

criminal merely to question the truth of Christianity. And he ruled that "*If the decencies of controversy are observed*, even the fundamentals of religion may be attacked without the attackers being guilty of blasphemous libel."

Two successive juries disagreed; but on the third trial Foote was sentenced to a year's imprisonment. The conviction aroused much feeling among the working classes; and at the general election of 1885 "the repeal of the Blasphemy Laws" was strongly urged upon all candidates for working-class constituencies. On my entering Parliament in that year, Mr. Bradlaugh, then the leader of the Secularist party, asked me to introduce a Bill for that purpose, which I accordingly did. This "Religious Prosecutions Abolition Bill" proposed to do away with both the common and the statute law against blasphemy; but to replace them—as I felt to be essential—by the enactment of Macaulay's prohibition against intentional insults to religious feeling. Here, however, was a fatal difficulty. The general body of Secularists at large refused to accept anything but an unqualified and absolute licence in controversy. Mr. Bradlaugh accordingly, though personally approving of the Indian clause, said that he must oppose the Bill if it were carried to a second reading. It accordingly dropped. But when he in 1889 re-introduced it without Macaulay's protecting clause, the absence of that limitation was made so strong an objection to the measure that the second reading was negatived by 111 votes against 46.

The common law rule—whatever it were—thus remained in force. And Lord Coleridge's view of it did not remain unchallenged. In Molière's phrase, "the deceased was not yet dead." In a civil action brought by a man who had been slanderously accused of being a blasphemer, Huddleston B. and Manisty J. dismissed that view as being a mere dictum, not binding upon them (*Pankhurst* v. *Thompson*, 3 T. L. R. 199).

But in all criminal prosecutions subsequent to Lord Coleridge's judgment, his authority was accepted and followed; as, for instance, by Phillimore J., in *Rex* v. *Boulter* (72 J. P. 188). Finally, it received, in 1917, a unanimous approval in the House of Lords.

In *Bowman* v. *The Secular Society, Ltd.* (L. R. [1917] A. C. 406) a testator had given his residuary estate upon trust for the Secular Society, Ltd. One of that society's fundamental objects was "to promote the principle that human conduct should be based upon natural knowledge and not upon super-

natural belief, and that human welfare in this world is the proper end of all thought and action." The testator's next of kin disputed the validity of the gift, on the ground that the objects of the Society were unlawful. But the gift was held lawful by Joyce J. and by a unanimous Court of Appeal. In the House of Lords, Lord Finlay took the opposite view. Yet as regards criminal law he accepted the rule laid down by Lord Coleridge in *Foote's Case;* and agreed that attacks upon Christianity would not be punishable if "decently conducted." But he considered that "the law will not *help* endeavours to undermine Christianity." His acceptance of the rule in *Foote's Case* was unanimously confirmed by the other four law lords who sat; an age-long controversy being thus set at rest. The four, however, went further, and held Mr. Bowman's bequest to be consequently valid, as the mere propagation of anti-Christian doctrines was thus not in itself illegal. Indeed, the question of its illegality was held by three of the Lords to be immaterial; as the Society, in their opinion, did not take the property upon any trust, legal or illegal, but received it in absolute beneficial ownership.

After the general doctrine as to Blasphemy had thus been conclusively established, two minor points were settled in *Rex* v. *Gott*—the recent prosecution mentioned at the beginning of the present article. (1) Avory J. laid down the rule—and it was not dissented from by the Court of Criminal Appeal—that it is not necessary that the offensive words should cause a breach of the peace then and there, at the time of publication. It would be sufficient if one were caused subsequently, "by some one taking the pamphlets home and reading them, and then next day finding the vendor still selling them." Nor indeed need there be any actual breach of the peace at all; the mere tendency to provoke one suffices. But (2) this tendency must not be measured by the susceptibilities of a person of strong religious feelings, but by those of the general community. The libel must be so bad as to be—in the words used by the Court of Criminal Appeal (16 Cr. App. R. 89)—"offensive to any one in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm Christian, or merely a person sympathising with their ideals." Of that offensiveness the jury are, by Fox's Libel Act, made the judges. In cases of seditious libels, that Act has usually worked in the defendant's favour. But in cases of blasphemy it may be doubted whether the jury will not be likely to view him less impartially than a High Court Judge would.

We have seen that, from Sir Matthew Hale's time onward, it has been clear that the crime of blasphemy, unlike that of private defamation, may be committed by utterances merely oral, as well as by words written. Nor indeed are words at all necessary; there may be blasphemy by a pictorial caricature; or even by silent acts of irreverent insult, as when in October, 1909, at a public skating rink in Dublin, one of the skaters appeared dressed as a travesty of Christ. An instance better known is the contemptuous burning of copies of the authorised English version of the Bible by Roman Catholic controversialists; for which a monk was convicted, about seventy years ago, at Mayo Assizes by a jury of mixed faiths, and Padre Petcherini was prosecuted in Dublin but acquitted (7 Cox 84).

Our review of the history of the crime of blasphemy shows that its *actus reus* can now be defined with precision. But a question may be raised as to the necessary degree of *mens rea*. Is it sufficient that the defendant did intend to publish the blasphemous words for which he is indicted? Or is it necessary that he should have known their offensive character and have intended to offend? In civil actions to recover damages for a libel, no such intention is necessary; a man who, by mistaking it for a different and innocent letter, unintentionally posts a libellous one which also he has written, must suffer for his mistake (9 B. & C. 382). But in criminal proceedings, guilt can only arise where the offensive matter was published with full knowledge of its contents and with readiness to offend. "Wilful intention," as Professor Starkie said, "is the criterion and test of guilt." A foreigner imperfectly acquainted with English may well have failed to appreciate the coarseness or contemptuousness of the phrases he has used.

III.

The judiciary law as to blasphemy has, then, reached at last a condition congenial with the tolerant spirit of modern times. No argumentative attack upon Christianity is now criminal unless it contain (in Lord Parker's words in *Bowman's Case* (p. 446)) "such an element of vilification, ridicule, or irreverence, as would be likely to exasperate the feelings of others and so lead to a breach of the peace."

A wise rule. But a rule which, it seems to me, needs to be universalized by Parliamentary legislation. Christianity is thus protected against wanton insult. But the rule falls far short of Macaulay's Indian clause, which protected *every* man

against an insult to the religion dear to him. On the prosecution in 1838 of a clergyman named Gathercole, for a libel on the nuns of a convent in Yorkshire (2 Lewin, 237), it was laid down by no less a Judge than Alderson B., in terms which have since been constantly quoted as authoritative, that "If this is only a libel on the whole Roman Catholic Church generally, the defendant is entitled to be acquitted. A person may, without being liable to prosecution for it, attack Judaism or Mahometanism; or even any sect of the Christian religion, save the established religion of the country." Very bluntly was the same position stated by no less eminent an American Judge than Chancellor Kent. In 1811, in *The People* v. *Ruggles* (5 Am. Dec. 335), he recognized and followed the common-law doctrine that it is indictable to revile Christianity with malicious contempt. But he added that it would be no crime to make "the like attacks upon the religion of Mahomet or of the Grand Lama. . . . The morality of this country is ingrafted upon Christianity and not upon the doctrines . . . of those impostors. . . . The imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown."

But, not to speak of the rights of dissenting Christian sects or of the Jews, the presence in England to-day of many followers of Muhammad and of Buddha suggests the importance of an extension, even to those faiths, of the protection—what is now the moderate and just protection—which the law gives to Christianity. A century and a-half ago, Voltaire's tragedy of *Mahomet*, with its hostile portrayment of Islam, used to be performed with general applause both in France and England. To-day such a performance would be impossible. So great, indeed, is the respect shown now to Oriental faiths that we have recently seen the Lord Chamberlain prohibit the use of the word "Mecca" as the title of a play; so that "Cairo" was accordingly substituted.

A further point in which the law needs amendment at the hands of the Legislature is, as we saw at the outset, the repeal of those impotent anachronisms—the Statutes which punish the expression of opinions upon religion. There still survive two enactments of the Reformation period (1 Edw. VI. c. 1, s. 1; 1 Eliz. c. 2, s. 3), the former of which punishes with fine and imprisonment the use of contemptuous words concerning the Eucharist, whilst the other threatens a fine—or, on a third conviction, imprisonment for life—for speaking in derogation of the Prayer-Book. And—of more direct importance at the

present day—there is that Act of William III. of which I have previously spoken, which Stephen J. condemned as "ferocious," Lord Lindley as "cruel," and Lord Coleridge as "shocking"; and which (as I mentioned at the outset) the present Home Secretary "is of opinion may well be repealed."

These three old enactments are approved of to-day by no one. They have lingered into longevity only through having been left in lethargy.

Just two years after the House of Lords had in *Bowman's Case* settled one long-disputed question in the law concerning matters of religion, it proceeded by a more startling decision to overthrow in that branch of law a doctrine that rested upon a chain of decisions which went back to 1602 and (in the words of the Lord Chancellor) had for generations been treated as binding. For in *Bourne* v. *Keane* (L. R. [1919] A. C. 815) it declared the validity of a bequest of money to provide masses for the repose of the testator's soul. These two epoch-making decisions are akin in enlarging—on the one hand for the Freethinker, on the other for the Roman Catholic—the liberty to devote property to promote the purposes which he holds dear. They have been hailed warmly as final landmarks of legal progress.

Yet are they final? I foresee the possibility that a future Legislature, alive to the supreme importance of truth and to the value of unbiased inquiry and discussion as the best avenue to truth, may some day advance to the point of prohibiting all permanent endowments for the maintenance of any crystallized form of doctrine upon any subject, sacred or secular. For such endowments tend to preserve that doctrine into a factitious survival, and so mar the uniformity with which the judgment of mankind, if left to its normal action, would have travelled towards truth.

COURTNEY KENNY.

THE WORK FOR THE EMPIRE OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.[1]

MR. President and Gentlemen,—You make me feel a little shy. When I somewhat incontinently accepted your kind invitation I wholly forgot that I was a Judge of the Privy Council. Thank heaven, I have no written address to deliver, and I am informed that there are no reporters present. But even that does not free me from embarrassment. I have undertaken to speak to you to-night of the position of the Judicial Committee in the Constitution of the Empire, and I have to remember that we who sit on the Judicial Committee have taken a tremendous oath not to disclose any of the secrets that come to the fore there; and I have also to consider that it was only this very morning that at half-past ten, in the absence of the Lord Chancellor, who is frequently called away at this moment on other business, I was sitting to dispose of the list in that Court, presiding as the senior remaining ex-Lord Chancellor. Well, we finished the list at eleven, and I went over to sit on the Woolsack at the House of Lords, which I occupied till a quarter to four, when public business made it necessary that I should adjourn the tribunal a little early. I did not say why, and my unsuspecting colleagues acquiesced. Now, gentlemen, you will see why I have something of the sense of the boy who comes to tell tales out of school. However, let us begin.

First of all, before anybody speaks of the Judicial Committee of the Privy Council, the first question that would be put to him is: What is the Court like? Where is the Court, and what is it? You always want to know what the physical thing looks like. Anybody who wants to know this should take a walk down Whitehall from the east. He will come to Downing Street. Then let him turn up to the right, when he will come to a very dirty door inscribed "Judicial Office"; and he will think, unless he knows better, that this is some minor department of the Treasury, where it collects the fees from the County

[1] An address delivered to the University Law Society on November 18, 1921, by the Right Hon. Viscount Haldane of Cloan.

Court suitors. Do not let him be deterred. It is true that the door is in a very bad condition; I did my best when I was Lord Chancellor to get the Treasury to make it better, but that body always takes the view that the more obscure a door the better it will function in the Empire. Consequently, and very grudgingly, they agreed to give only £200 for the improvement of the doorway; but that was cut off when the war broke out, and the talk of economy began to arise. Well, do not be deterred by that door, but go in. You will not think that it looks like a Court, particularly as you will see one or two gloomy-looking officials glancing enquiringly at you. Brush them aside. This is the supreme tribunal of the Empire, and every subject of the King-Emperor is entitled to go in there. You will see on your right a rather dilapidated-looking red-covered stair. Go up it—which you will do in company with white men, some of whom look as if they had come from the far West, and may be of American appearance; yellow men, some of whom come from Hong Kong; Burmese, who come from Burma; Hindus and Mohammedans from India; Dutch from South Africa; a mixed race from Ceylon—all sorts of people may be straying in there, and you will feel yourself in good Imperial company. When you get to the top, go forward till you come to a rather forbidding door, and when you have penetrated that you will find yourself in a really respectable and nice-looking courthouse panelled with oak, with a high ceiling—everything, in short, that a Court should be. It is divided into two parts. On the side you go in you meet with strange company. I saw there the other day somebody from South Africa, obviously a person of authority among his own countrymen, but it was plain that he knew no word of English. He was so high that he was accompanied by his Cabinet and a Prime Minister with a magnificent gold staff, &c., and one or two ladies in picturesque costume. These and other strange sights you will see in the first part of the Court; and besides these you will see other men of every complexion, all of them distinguished by this—that they have assumed wigs and robes, to which in some cases they are obviously unaccustomed. Then there is a Bar; and beyond that you will see five elderly gentlemen, in various stages of increased years, who sit at a horseshoe table. The table looks new, because they used always to sit at a long table right away from the door, from which the presiding Judge was furthest off, and where it was very difficult for him to hear. Even to-day there is always a chair left vacant, for a very highly constitutional reason—the

Sovereign is supposed to come and sit there, and dispense justice to the whole Empire. I cannot say that I ever observed him do so. Now that is the Court. The Judges wear no wigs, no robes—they are simply members of the Privy Council, and yet it is not every member of the Privy Council who can sit there. A constitutional rule prescribes who may come and who may not; and those who come are carefully invited, and are there by royal authority and the joint advice of the President of the Council and the Lord Chancellor. Well, that is what the Court is and looks like; and for the rest it is like any other Court, until you get to the judgment. Cases are argued just as they might be in an ordinary Court; but when you get to the judgment, generally it is put in writing, sometimes not, but it always assumes this form: The Judges do not give any judgment; one of them speaks, after they have been in consultation, on behalf of the whole body of five, and there is no dissent. It is a most solemn part of the oath not to reveal what has passed in deliberation. If any Judge were to say that he had not agreed with his colleagues, the sword of the Constitution would descend on him. It never happens. What does happen is that at the end—generally after days of consideration—one or other of the members of the tribunal, in the name of the rest, reads out from a written judgment what the view of the tribunal has been, and that their Lordships will humbly advise accordingly. You may think that is a very curious form of judgment for the supreme tribunal of the Empire. But it is not the end. The judgment is not given by the tribunal. It only makes a report as to what the judgment should be; but although it is a report meant to go to the King, it is made publicly—there are reporters there. It is carefully recorded and embodied in a draft Order in Council. It is taken across the Horse Guards up to the Palace of St. James, where there meets a formal Privy Council. What I have been describing to you is the Committee of the Privy Council; but the matter comes subsequently up to a formal Privy Council, where, in the presence of the Sovereign, the President of the Council and a number of people who are not lawyers sit. And then there are read out just the names and the authorities and the short substance of the order; and the Sovereign bows, and an Order in Council is recorded, embodying the conclusions of the report which have been made to His Majesty in full Council from the Judicial Committee. That is the whole thing, but it is a tremendous procedure. It regulates the course of justice all over the Empire outside the United Kingdom. I have been in

the peculiar position of being at one time both a Minister of the Crown and also a member of the Judicial Committee, with the result that I sometimes was at the Privy Council and sometimes at the Judicial Committee; only I took care never to attend the one if I was going to attend the other, otherwise some acute critic of the Constitution might have said: "Ah, yes, the fountains of justice were somehow poisoned by the same man being at both sets of deliberations." But there is no deliberation at the formal meeting at the Palace, as I said.

Well, gentlemen, I speak of this body as one of my numerous spiritual homes. For thirty-eight years I have lived there. For twelve years I have been one of its Judges. For twenty-six years previously I was there while at the Bar, and nearly all through these years I was busy; and in my later years I was in almost every important case, and therefore I know something of that tribunal. I was there at the Bar during a long period, and I saw every kind of business. I have held briefs in it from India, China, Burma, as well as from South Africa, from Australia, from New Zealand, from Canada—I may say from every province of Canada too—and from nearly all the islands and territories which form the Crown Colonies of the British Empire, so that I am not talking to you of this place in the abstract; and that is well, because it is one of the institutions of the Empire. You cannot learn much about it from documents. I read books about the Privy Council which are founded upon the study of the documents, but you cannot learn it that way. Its constitution is mainly unwritten, and its conventions are unwritten; so that, unless you have lived in it and in the atmosphere, you do not know what happens there.

Well, after this preliminary excursus, let me come to the question of what the Judicial Committee of the Privy Council really is in the working of the Constitution of the Empire, for to understand that is to understand much else in the English law. To do this you must resort to the historical method. There was a period, as we know, when, in the days of King Alfred, the neighbours administered justice and dealt with their delinquent brother on the spot; but after that, and particularly under the Norman Kings, the King himself took a large part in the administration of justice, and it was only as things grew that he delegated matters to his own justiciary and to his *curia*, and finally more and more was delegated from the Sovereign to the Judges of the administration of justice through the country. The Judges in London did the work; and the Chancellor, who was then the King's secretary and an

ecclesiastic, dispensed an extra kind of justice, in which he mitigated the traditions and made new writs by which right could be demanded and wrong redressed. But the course of things was the gradual passage out of the hands of the Sovereign of the administration of justice in Great Britain. Of course, it was then quite different from what we should now call the Empire. Places outside Great Britain were mainly governed by the sword, though there were some other places where there were Courts, and where appeals were made to the King, who was theoretically the fountain of all justice. For example, there was a great contest, which lasted down to the time of the Stuarts, about the final appeal in cases brought from England, and at one time the High Court of Parliament claimed that appeal. If you appeal to the Privy Council, you address that petition directly to the King in his Privy Council. Parliament usurped the jurisdiction from the King in the case of England, and then the House of Lords usurped it from the House of Commons. That is how the appeal to the House of Lords began, and it developed, and finally took in Scotland and Ireland as well as England; but it never touched the jurisdiction of the Sovereign outside these islands, and consequently the growing tendency to appeal to the King as the source of ultimate justice from Courts all over the world belonging to British possessions continued. Now the King passes no solemn act except under constitutional advice, and because these belong to justice such acts have remained outside politics. His Ministers have had nothing to do with the procedure. It was left to his Privy Council; and by degrees the custom was begun of choosing only people who knew something about the law, and various statutes were passed, which culminated in the very well-known one in the reign of William IV., which put the Judicial Committee on a statutory footing; so now only men who are Judges in the House of Lords are allowed to sit, and, of course, the Chancellors and the ex-Chancellors and a certain number of other people—only three or four—who have been Judges of long standing, who have been made Privy Councillors, and who have been invited to join the Judicial Committee of the Privy Council. There are also a certain number of colonial Judges who have been made Privy Councillors for their judicial eminence, and these occasionally sit and assist in the deliberations.

And now, gentlemen, I have said enough to you to show you how the Judicial Committee of the Privy Council has grown up, and what sort of people sit there. I have just one thing

more to add. As you will see presently, the jurisdiction is a very delicate one. It is not always that the King can be safely advised to interfere with what belongs to the constitutions or systems of government of the countries of the Empire, and so the Judges of the Judicial Committee have been selected because of their training, not only in the law, but because in the case of most of them they have had experience elsewhere—in the House of Commons or in the House of Lords as members of it, or as Chancellors or ex-Chancellors, or by training calculated to give what is called the statesmanlike outlook to the Judge—that is to say, the outlook which makes him remember that with a growing Constitution things are always changing and developing, and that you cannot be sure that what was right ten years ago will be right to-day. The object of the tribunal is to make the part of the Empire from which the appeal comes have the sense of seeing that there has been a mistake, if one has been made. This has to be decided with a view to the law and spirit of the country from which the appeal is brought, and in accordance with the traditions of that country, and the task is one which, I think, on the whole, suits very well the genius of the British Empire. If you go to the Judicial Committee, if you go when Indian appeals are being heard, you will see an Indian Judge sitting (there were three Judges sitting this morning) and disposing of cases with immense knowledge of Indian jurisdiction and procedure. At other times you will see a distinguished Judge from Canada—sometimes two—sitting as part of the Judicial Committee and disposing of Canadian cases. I have seen South African Judges sitting, New Zealand Judges sitting, Australian Judges sitting; and when I was Lord Chancellor I remember the presence of the Chief Justice of South Africa, who had been made a Peer, and whom I commandeered to come and sit in the House of Lords and hear Scotch appeals, an occupation which somewhat alarmed him, but to which he submitted. That is how we try to preserve the judicial strength of the Court, because some Judges who sit in the House of Lords sit also in the Privy Council. We sit in three divisions—three divisions of five apiece. One sits for Indian appeals, of which there are a great many; the other for dominion and colonial appeals; and the third division, applying to a sitting in the House of Lords, hears appeals from, it may be, England, Scotland, or Ireland—the three parts of the Empire whose appeals go to the House of Lords.

Now I want to speak of the kind of personality which really

tells in the Judicial Committee. I have a pretty long memory of great men. I have seen Cairns sitting there, I have listened to Selborne, both of them consummate Judges; I have seen Bramwell and Blackburn there; I have seen Herschell and Lord Halsbury. But perhaps the most interesting figure who has sat there in my time was one who is in some ways little known to the public, but whose reputation among lawyers was of the highest; he has been dead for some time now. I speak of William Lord Watson, an extraordinary person who had a passion for excellence in all he touched in the law. He was a Scotch advocate who came to London knowing nothing, but everything to do with the law was to him profoundly interesting; and because he was a simple-minded person who did not concern himself with anything but that for which he had the passion, he became by degrees a great English lawyer. He has been said to have been the greatest English lawyer of his time. That was not because he was more learned than the others, but because of his supreme judicial quality of mind. I knew him very well. He was one of those people who did not present much of an external appearance. I remember an eminent artist who was commissioned to paint him, and in the portrait he looks nothing more than the president of a dining club. I said to the artist: "Why did you paint him like that?" He said: "Isn't he president of a dining club?" I said: "I don't know, but if you had seen him in the Privy Council, with his eyes flashing, when he was giving judgment, you would not have painted him like that." The artist was so impressed that the next time he went to paint a great Judge —he painted one who had a particular genius for keeping the Court in order—he painted him with such flashing eyes that one felt that trial by jury was a farce. However, there was Lord Watson; he was marvellous. Every case that was opened before him was for the time the supreme incident of his life. He never got excited, but he used to talk to himself aloud. I remember once saying to my junior: "If only we knew what Lord Watson is saying into his beard, we should win this case." He was, on the whole, a loquacious Judge, but the wonderful thing was the flow of legal reason which came from him. As I said, I knew him very well, and sometimes he would send me a message—if there was a case in which I was not concerned—and ask me to come and talk over a point. I would go, and find the old man in an armchair with a long clay pipe and a glass of whisky and water. He said he wanted to see me, but seeing him consisted in this—that he set forth his

case in a very lucid way with the arguments for both sides, and then said he thought the conclusion was quite clear. What he wanted was an audience. But that was the method of this most simple-minded man of the law. Moreover, as he had had large political experience, he became invaluable just for the very qualities that were required in the Judicial Committee of the Privy Council. Particularly he rendered an enormous service to the Empire and to the Dominion of Canada by developing the Dominion Constitution. At one time, after the British North America Act of 1867 was passed, the conception took hold of the Canadian Courts that what was intended was to make the Dominion the centre of government in Canada, so that its statutes and its position should be superior to the statutes and position of the Provincial Legislatures. That went so far that there arose a great fight; and as the result of a long series of decisions Lord Watson put clothing upon the bones of the Constitution, and so covered them over with living flesh that the Constitution of Canada took a new form. The Provinces were recognized as of equal authority co-ordinate with the Dominion, and a long series of decisions were given by him which solved many problems and produced a new contentment in Canada with the Constitution they had got in 1867. It is difficult to say what the extent of the debt was that Canada owes to Lord Watson, and there is no part of the Empire where his memory is held in more reverence in legal circles. I remember, too, his wonderful statesmanlike attitude in dealing with cases from other parts of the Empire. The jurisdiction of the Privy Council extends to the Channel Islands, which are near France; but there has always been a certain amount of suspicion on the part of the islanders, based on the recollection of English history, about the procedure of the French, and I remember well a French subject who, when in Jersey, had committed some offence against morals, being seized by the islanders, tried, and condemned to death under the old Jersey law, which was an old-fashioned law. Well, the French Government not unnaturally interposed, and came to the English Foreign Office and said: "You have taken our subject and condemned him to death for a matter which with us would have meant a few francs fine." Thereupon the Foreign Office made representations to the islanders of Jersey. But these were not made of soft stuff, and they said: "No. Judgment has been passed on him, and our Parliament does not propose to interfere." Thereupon the Home Office issued a pardon from Queen Victoria to the criminal who was under

sentence. But the next act of the islanders was to say that the executive acts of the Sovereign were not effective in that island until they had been registered by the Court, and that the Court would sit and in due course register it, but not until the day after the execution. Well, the prisoner was confined in the castle of St. Orqueil, which is a castle on the shore in the island of Jersey; and the British Navy appeared at night with a gunboat, and by an operation of great strategical skill, such as I am informed is performed at times in Cambridge, put out a crew, extracted the prisoner, and took him over to France. That ended the matter so far as the life of the prisoner was concerned, but it did not end the matter so far as the Constitution was concerned. The Home Office, flushed with triumph and pride, passed an Order in Council which gave themselves a majority on the Jersey Prisons Board, so that in the case of another prisoner in Jersey they could release him by an Act of State demanding it. But the island challenged this, and said that a Constitution had grown up in Jersey in which such a legislative act as this could not be constitutionally passed without the advice and consent of the Jersey Parliament, and that nothing short of an Imperial statute would do. Accordingly they flouted and gave the go-by to the new Order in Council. The matter came to the Privy Council, and a special Judicial Committee considered it; and the extraordinary point about it was that it was an appeal by the island to the Privy Council against an act of the Privy Council done on the advice of the Home Office and in the name of the Sovereign —a very odd proceeding. The islanders raised a tax to meet the not inconsiderable costs of this litigation. The basis of the argument began in the time of the late Lord James of Hereford and of Lord Davey, then both of the Bar. I was originally their junior. In course of years the case came on, and I found myself leading. When I had modestly opened the case, and was asked how long I thought I should take, I replied that I *could* compress my remarks into eight days. Presently Lord Watson rose to the occasion, and said that, in his opinion, it was highly inexpedient that the Council should decide this abstract question without its being essential. He was of opinion that the Home Office were going back on their own convention. They ousted their own Order in Council on that ground, and Lord Watson said that, if anybody raised a constitutional question and demanded that it should be disposed of, the only thing he was quite clear about was that he would do all he could to make that party pay the costs. It solved the thing

satisfactorily to me, for we won our case against the Crown; but it illustrated how that tribunal never will decide anything it is not necessary to decide, and avoids all controversies which arise out of abstract propositions.

Again, I have seen that same Court do other things of the same kind. Recently a case came from the natives of the Gold Coast of West Africa. They had a dispute with the Crown as to the title to their land, and the Crown, acting on the assumption that where you cannot prove anything else English law prevails, applied the principles of English real property law. The judgment went against the natives, and they came in full force into the Privy Council. Only the other day we set all that aside on the ground that this Empire was an Empire which disclosed, when you scanned it, every kind of land law; and above all, when you were dealing with natives who had not thrown off their original institutions, you must recognize tribal ownership, with the result that English property law cannot be fitted in.

Then, again, I have known that tribunal, when I was at the Bar, hearing a case from Zanzibar; and it was one of those curious cases where, because the British Government had only a lease of some territory, the Mohammedan law prevailed in it. A railway had been built on someone's land without his assent, and he claimed, not only his land, but the railway. He said: "The railway is now my railway." But the Judges out there set his contention aside, and said it could not be so in Zanzibar. No good reason was given, and the landowner appealed to the Privy Council. I remember a powerful tribunal of seven, with Lord Chancellor Halsbury presiding. It was argued by myself for the landowner that there was no warrant in the Mohammedan law for saying that it was in any way different from the English law. Well, they said: "Oh, you put in no affidavits—no proof of what the Mohammedan law is." "My Lords," I replied, "I am addressing your Lordships, not as seven English Judges who require to have foreign law proved to them, but as seven Cadis of the Mohammedan religion who are presumed to know the Koran." But Lord Halsbury searched the Koran on the spot. He discovered a deadly text. It is that if anybody plants a plane tree on his neighbour's land, yet the neighbour shall not claim the plane tree without making proper compensation—quite differently from the law of England.

The other day we interpreted the Constitution of Newfoundland. If you make a contract with a Government that has got a Constitution, you must have knowledge of that Constitution;

and if it is the ordinary type of Constitution, the contract cannot be a binding contract without the consent of the Parliament. That is the kind of question where the element of training in other things comes in to the assistance of those who sit as Judges.

Now, gentlemen, I have dwelt on these things simply because without understanding them you cannot realize what sort of a body the Judicial Committee of the Privy Council is. It is a body which advises the King in Council; it is a body which has to take into account what the relation of the King is to the dominion or part of the Empire from which the appeal is brought. This morning we dealt with four applications for leave to appeal to the King in Council. Well, of these three were refused. In the fourth case it was granted, and one of the elements which undoubtedly came in was this—that the first three cases were cases which came from the Dominion of Canada and Newfoundland, where they had got their own fully organized Courts, and their own sense of development, and their own feeling that it is their right to dispose of their own litigation, so that when a litigant comes to us we do not let him appeal to the King, unless the question is so great that only the Supreme Court of the Sovereign can dispose of it satisfactorily. I daresay you know that from time to time there are questions which come from Canada which we refuse to entertain on the ground that they are domestic questions. But in the fourth case it was an appeal from the Crown Colony of the Gold Coast, where the tribunal is not developed in the same way, and the Privy Council sits as the guardian Justice to take care to see that justice is done. Many of you know how in remote parts of India they look to the Judicial Committee as a body which stands between the subject and the Government. You know, I daresay, the tale of the traveller who went to a remote part of Northern India and found a tribe sacrificing to an unknown god. He asked who the god was, and they said: "We don't know, except that he is a very powerful god, because he interfered on our behalf against the Indian Government, and gave us back our land which the Government had taken, and the only other thing we know is that the name of the god is the Judicial Committee of the Privy Council"!

Well, we sit there, perfectly impartial; we have no prejudices, either theological or otherwise. If you come there, you may find unusual things happening; you may find an idol bringing in an appeal to the Privy Council. In our Courts a human

person is the only person that is allowed to appear; but with India it is often different, and in their Courts the idol of a temple may appeal, and all we take care of is to say that the idol must not sue except by a friend who will be answerable for the costs. It is perfectly natural that an idol should sue in India. We sit there to administer Buddhist law, or Hindu law, or Mohammedan law, one after the other. We administer Roman-Dutch law from South Africa or from Ceylon, or French law from Quebec, or the common law of England from Ontario, or curious mixtures of law which prevail in various colonies, sometimes Italian law, sometimes Roman. We sit there and we do our best. We are only human beings and I daresay we make mistakes, but there is a tradition in the place which lifts it above all prejudice or the disposition to think that one system must in some way be better than another. That is the kind of spirit in which a tribunal of Judges, with this kind of training which is essential to them, proceeds. The Judges try to look for the common principle underlying systems of jurisprudence of differing kinds. They know that the form often veils over a very similar substance. We are constantly finding that, where great broad principles of justice are concerned, you find—veiled, but still there, and only distinguished by technicalities—the same substance as belongs to other systems. The human mind is much the same all the world over. The differences are much less than the identities, and that has been our experience in the Judicial Committee. I think the real work of the Committee is that of assisting in holding the Empire together. My own view is that it is a disappearing body, but that it will be a long time before it will disappear altogether. By degrees, as each dominion develops its own Constitution, as India, Canada, and Australia (which has in a very large measure completed the development of its Constitution), there will be less and less work for the Judicial Committee to do for these dominions. But there is always growing up a great deal of fresh work from the Crown Colonies, which are only in course of development. There will come a time when the Judicial Committee will become effete, but at present we have constant indications that we are a useful body in vast regions where it is not always easy to get a common point of view. Our function is not to claim any fresh rights to interfere, but to act as statesmen should, being willing to help if called in, but not pressing assistance where assistance is not desired. What will be the future of the Committee it is difficult to say; but if the House of Lords should be reformed, I think the

reform should take the shape, as it may in the end, of the judicial functions of the House of Lords being transferred from what will then be a merely political Second Chamber. It may well be that the usurpations of the past will be undone, and the jurisdiction of England, Scotland, and Ireland will revert to the King in Council, to whom it used to belong. Then we shall have the Privy Council sitting in four or five instead of three divisions, and dispensing justice all over the Empire, including these islands. The change will be merely one of form, but it will be a change which will tend still further to unify a broad feature of the Constitution; and I therefore think that, whatever change is made in the case of the House of Lords, the only result of it is likely to be an increase of the business which is at present entrusted to the Judicial Committee.

Now, gentlemen, I have already spoken longer than I intended, and I have endeavoured to put before you something of what the nature of that great judicial body is, and what is its position in our unwritten Constitution. Just because that Constitution is unwritten and constantly developing, and because the position of the Judicial Committee has somewhat altered as generation succeeds generation, there is one thing of which I would warn you, and that is that you cannot study it sufficiently merely in text-books or documents. The only way to study it is to watch it. There is that rather dirty-looking Court to which you go from Downing Street, and where every one of you has a right to enter. I suggest to you that it is a place more worthy of attention and observation than has hitherto been realized in this country. Most people do not know where it is; still less do they recognize its supreme importance in disposing of cases throughout the Empire. If anything I have said to-night may encourage some of you to think that here is a new field of research, a new domain of interest for the jurist and the historian, then I shall feel well content at having been here to-night.

HALDANE.

THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE.[1]

LOOKED at with respect to subject-matter these two books are more truly two parts of one work, the former being the historical introduction and the latter the dogmatic and critical exposition of the present law. Indeed they were intended originally to be one volume and separation resulted from inclusion of the historical portion in the *Cambridge Studies in English Legal History*, to which the dogmatic and critical portion, perhaps with excess of scrupulousness, was thought inappropriate. It must be said, however, that the line has been drawn skilfully between the two volumes and those who have occasion to use the second for practical purposes may very likely prefer the arrangement as it stands.

Professor Hazeltine's introduction to the series worthily begun with Dr. Winfield's history of the English law of abuse of procedure deserves notice. He starts with a proposition, which is to be the keynote of the series, "that English law has a place in world history and not merely in insular history." He insists that England has exported as well as imported law. He refers with pride, as a common-law lawyer may well do, to the competition of English law with Roman-French, Roman-Spanish and Roman-Dutch law, and rightly esteems the growth of English law in the environment of these other systems "one of the most important aspects of English legal history in its setting of world history." Thus he contemplates a series of historical studies in which the history of English law shall be set forth "as an integral part of the cultural history of mankind." Not only will "any aspect of the world-history of English law" be within the scope of the series but he promises to include "the relations between legal and institutional growth" and the

[1] *The History of Conspiracy and Abuse of Legal Procedure.* By Percy Henry Winfield, LL.D. of St. John's College, Cambridge, and the Inner Temple, Barrister-at-Law; Lecturer at St. John's and Trinity Colleges, Cambridge. Cambridge Studies in English Legal History. Cambridge: At the University Press, 1921, pp. xxvii, 219.

The Present Law of Abuse of Legal Procedure. By the Same. Cambridge. At the University Press, 1921, pp. xx, 256.

"relations between legal growth and the political, religious, economic and social aspects of development," and to regard the relation of legal history to "the ends which the law should be made to serve in our day and generation." This conception of a series of legal historical studies leaves nothing to be desired, Executed by historical scholars such as we have come to expect from Cambridge and edited with the critical historical learning and broad juristic vision of Professor Hazeltine, the *Cambridge Studies in English Legal History* should prove a notable agency in the revival of creative legal science which is at hand among all English-speaking peoples.

One is tempted to conjecture that Dr. Winfield's historical study was complete before Professor Hazeltine's inspiring project was matured. At any rate it is purely a doctrinal history, well done as such, but with some of the limitations of its kind. Moreover, its scope is limited to the English doctrinal materials. Many opportunities for effective employment of comparative law suggest themselves. Thus, the provisions of the Statute of Westminster II. with respect to those who maliciously abet appeals afford an interesting example of the idea of a "penalty of reparation" and of a stage in the development of reparation out of composition. Nor have comparisons been made within the field of English legal history where they might have been made with effect. Thus in the action on the case in the nature of a writ of conspiracy the difficulties involved in "malice" in a just balance between the interest in due prosecution of offenders and the interest in the security of innocent individuals may be compared with analogous cases in modern law of reluctance to inquire into subjectively manifested injury and reluctance to try motives in case of what has been called "abusive exercise of rights." Likewise American legal history, which sometimes affords much additional light, has been left out of account. To give but one example, American experience with misconduct of jurors can add much to the discussion of that subject. But such things have been excluded through conscientious adherence to a strict design.

Abuse of legal procedure is a matter in which a just balance between conflicting interests has proved exceptionally difficult. There is much instruction for the jurist of to-day in the long history of the struggle of legislative and judicial inventiveness to make individual malice an agency for promoting the general security and yet not a menace thereto; to make it an instrument of bringing the unjust to account and yet prevent it from becoming a standing menace to the just. One is not surprised

to read that "most of the methods devised to check abuse of legal procedure were themselves abused" (p. 21). The difficulty appears at the very beginning of legal treatment of this subject, *e.g.*, in punishment for false (*i.e.*, unsuccessful) appeals, tempered by mercy because the appellor fought in defence of the peace (p. 5), and in the frequency side by side of fines for false presentment and fines for concealment of offences (p. 14). Dr. Winfield has perceived the crucial importance of this conflict of interests for the story he was telling, and has written it as the "story of a long struggle to solve the legal puzzle of punishing the rogue who would kill and rob with the law's own weapons without at the same time terrifying the honest accuser or plaintiff" (p. 67). Just because so much of the law on the immediate subject is now obsolete and hence may be looked at without the prejudice involved in controversial questions of to-day, the history and details of justification for combinations to set legal machinery in motion are of the first moment for study of how the law grapples with hard problems of a balance of interests. If there were nothing more, this feature would justify the volume as a contribution to a functional legal history.

Another feature of importance for those who would use legal history in making the law of to-day serve the ends of to-day is the decisive rôle of the Star Chamber in putting an end to abuses with which legislation and judicial decision had struggled in vain. From the reign of Edward III. to that of Henry VI. abuse of legal procedure through conspiracy threatened to destroy the efficiency of the centralized legal and judicial system that had grown up in the twelfth and thirteenth centuries. How serious a failure of this legal system might have been will appear when we reflect that through its survival in full vigour the British Empire was enabled to become a legal empire—that is, one legally unified—rather than an administrative empire—*i.e.*, one administratively unified—and so ill-suited to endure expansion over every part of the world. "It was the Star Chamber that withered conspiracy [*i.e.*, combination to abuse procedure] at its root" (p. 107). When legislative and judicial remedies failed because those who were called on to enforce them were frequently the worst offenders, the administrative machinery of the Star Chamber was an effective agency of relief (p. 154). There is much for us to bear in mind to-day in this demonstration of the superior effectiveness of an administrative tribunal. We have been acutely aware of the disadvan-

tages of such tribunals and it is well to have the other side of the account brought home to us.

No one can write upon English legal history without coming into conflict with the masterful creative activity of Sir Edward Coke. To him everything was but declaratory of the common law, and Dr. Winfield has had to correct the echoes of Coke in the later books by a series of patient and critical investigations. Thus, Coke held, apparently on the authority of the Mirrour, though there were dicta to the same effect as far back as the reign of Henry VII., that there was a writ of conspiracy at common law. On the other hand, no such writ is mentioned in Glanville or by Bracton or in Bracton's Note-Book, and examinations of MS. Registers of Writs of the thirteenth century makes it reasonably clear that no such writ existed. Again Coke asserts that maintenance and champerty were forbidden by the common law apart from legislation. But the evidence more than justifies Dr. Winfield's conservative observation that when Coke asserted there were remedies for those wrongs at common law he was snatching at straws (p. 142). It should be said, however, that in such criticisms of Coke we are in danger of assuming the modern common-law dogma that a statute may only yield a rule, not a principle, and of thinking that if declaratory it must be declaratory of a rule, whereas Coke was close to the time and deeply read in the books of the time when legislation, judicial decision and administrative framing of a new writ were all and equally felt to be declaratory and wrote in a time when declaratory meant declaratory of a principle. Hence he treated an old statute as a bit of legal material of exactly the same sort as an old judicial decision or an old writ. Coke's doctrine that embracery was a common-law wrong for which an action of maintenance would lie (pp. 167-168) belongs to a period when classification by analysis of the subject-matter has superseded purely procedural classifications of the strict law. As Dr. Winfield says, it is "more artificial than history warrants." Unhappily this is true of all analytical generalization which must always do some violence to history. Such, indeed, is the moral pointed by the virtual abandonment of nineteenth-century analysis in Professor Buckland's new text-book of Roman law.

One defect of purely doctrinal legal history is that with its eye on the formal shape of the legal rule or doctrine it may easily overlook a substantial continuity, when looked at from the standpoint of the social interest secured, and create an impression of a breach of continuity when there is none. Thu-

when it is shown that originally and on the whole down to the seventeenth century conspiracy meant combination to abuse procedure (p. 109), and that the change to its modern sense "has come by astute adaptation of a term which had never lost its early plasticity" (p. 109), the change wrought in the seventeenth and eighteenth centuries might seem more radical than it really was. This is true even though Dr. Winfield gives us the materials for preventing such a misconception by an examination of the Parliament rolls, which from the thirteenth to the sixteenth centuries show conspiracy as a combination inimical to the security of political institutions (pp. 109-111), and from the fourteenth to the sixteenth centuries show it as a combination to restrain or interfere with trade, *i.e.*, as one inimical to the security of economic institutions (pp. 111-112). In the creative era of the seventeenth century the writ of conspiracy had become obsolete because the action on the case did its work more effectively. "The original meaning was disappearing, save for the idea of combination, and it was not difficult to tack on to that idea almost any conceivable evil object two or more persons might have" (p. 112). All that seems to be continuous is the idea of combination. But throughout the interest protected is the general security, threatened by the power of mischief that lies in concerted action. The medieval form of threat to the general security by concerted action was combination to abuse procedure; the fourteenth- and fifteenth-century form was political combination which was for the most part outside of the cognizance of the common-law courts; the sixteenth-century form was concerted commercial action, and the nineteenth-century form was concerted industrial action. The changes are in the means by which concerted action came to threaten the general security, and they require a study of social and economic history to bring out their significance and to show the doctrinal history in its true relief.

It remains to point out important contributions to the details of legal history in the discussion of the date of the Statute of Conspirators (pp. 22-27) and in the history of the law as to misconduct of jurors and the effect thereof upon verdicts (pp. 175-193).

Turning to the second of the two volumes, treating of the present law as to abuse of legal procedure, we meet first a detailed critical and analytical exposition of the law of maintenance and champerty. Much of the law on these subjects is obsolete. It has been decided that, as body of specific rules of law, the English law on these subjects is not in force in India

because it was comparatively obsolete in England when India was acquired and "application there would be inappropriate" (p. 4). Except as a policy of the law with respect to contracts in some jurisdictions, it has been considered inapplicable and hence not part of the common law in the United States. Just how far the specific rules are in force in England has proved hard to determine, affording an interesting example of what Bentham called the "want of cognoscibility" which is both a weakness and a strength of English law. Thus the study of the old historical wrongs in their present condition is nothing less than a study of English juridical method.

Four examples of this want of cognoscibility are brought out. It is not clear whether maintenance is actionable as a tort in case no suit is begun. Again, for the purposes of the law as to maintenance, "a man can only be sure that his motive is good," and hence that he has an excuse, "by finding out whether his act is one of the legally recognized exceptions from the law of maintenance or by correctly guessing whether the Court will hold it to be such an exception in the case in which he is concerned" (p. 15). Again, it is uncertain just what constitutes an "officious" intermeddling. Also, we are told, no logical principle underlies the defences to maintenance and hence in any new situation we cannot foretell how the Courts will act (p. 22).

As to the first, Dr. Winfield shows clearly how confusion has resulted from the attempt in *Flight* v. *Leman*, 4 Q. B. 883, to assimilate the tort of maintenance to an action for malicious prosecution of a civil suit, and his sound analytical critique of the doctrines and dicta as to the case where suit is begun after the agreement to maintain, but the one who promised help did not give it deserves special mention. As to the second, might it not be possible to speak with some assurance by going outside of the cases on maintenance and drawing some general conclusions from the whole body of recent decisions in the law of torts? Might it not be possible to reason thus: On its face the defendant's act is one of aggression. Hence he may not justify it merely as one of individual self-assertion. He must show some other individual or public interest that is secured by his act, which may weigh against the claim of the other to be free from aggression. The need of proceeding and thinking in this way, if only for the practical purpose of determining what the Courts should and will do in cases that may easily arise, is brought out well in the third case.

Nine defences to maintenance are taken up in detail before

coming to the conclusion that they may not be hung upon any logical principle. The first is professional assistance as attorney, solicitor or counsel, where one acts as an incident of his pursuit of a lawful calling. A second is kinship, once important through persistence of the modes of thought of a kin-organized society, but now, it is probable, significant only as an ingredient in "interest." A third is a contingent or reversionary interest which would be affected by the result of the suit maintained. A fourth is the relation of master and servant. Here the conclusion that the maintenance must have some relation to or grow out of the service seems eminently sound. If it does, then the aggression is but an incident of the proper carrying out of a lawful relation. A fifth is "charity," or preferably assistance to the poor, of which legal aid societies afford a modern example. A sixth defence is compulsion by law, which is clear enough. A seventh is maintenance by way of advice out of "friendship and courtesy." Here "such authority or lack of authority as there is confronts us with the dilemma of drawing no deduction at all or of drawing one that would be little more than a guess at the attitude of a modern Court" (p. 44). But is it not the function of the law teacher to make such guesses and teach the art of making them wisely, and is it not his function as a juristic writer to argue them on the basis of the law as a whole and in such a case as the present on the basis of the law of torts as a whole? The English analytical jurisprudence has done much mischief if it has led teachers to feel that there is no law where there are no direct authorities in point. Dr. Winfield shows capacity for a high order of juristic criticism and his reluctance to engage in constructive juristic thinking, perhaps imposed by a conservative regard for the conventions of English law-writing in the past generation, is to be regretted.

In connection with the eighth case, buying of causes of action, the traditional anachronistic explanation of the doctrine of the strict law as to the personal character of obligation is well exposed. Then a case is put of acquisition of a chose in action by assignment for the improper purpose of stirring up litigation. It is argued rightly that the motive ought to be material and the holding of the Court of Appeal in *Fitzroy* v. *Cave* [1905] 2 K. B. 364 is well criticized. One must agree to the suggestion that the Court should have said that the motive was material, but that the motive in the particular case was a proper one. For the case raises the same point as the familiar question of "abusive exercise of rights" and calls for a consideration of a broad principle of balance of interests in which all the related

cases in our law of torts, comparative law and a theory of balancing interests must be brought to bear. This is brought out also when we look at the ninth category, "interests of other kinds." Here, it is said, "as there is no broad principle underlying the exceptions to the law of maintenance and champerty, and as those which have acquired particular names are not exhaustive, the law recognizes a vague general exception under the heading of 'interest.' This is useful, as its very looseness makes it possible for the Courts to mould the older law of maintenance in such a way as to give expression to the needs of the modern community. But it also makes it difficult to say where interest ends and officiousness begins" (p. 68).

Is not the ninth category the "broad principle" and hence only vaguely to be looked at as a category? Is it not the principle of which the eight foregoing are but concrete applications under the conditions of time and place? May we not say that officiousness is the absence of an interest to counterbalance the plaintiff's claim to be free from aggression? Interest, then, would be some claim of the defendant, or of the public, and hence of the defendant as asserting that claim, which the law recognizes as a justification for what on its face is an aggression, though not one which so far endangers the general security that if the defendant acts from a motive of securing that claim his free action ought to be limited? Let us note the six cases of these "interests of other kinds" with such a proposition before us. The first to be discussed is a supposed interest of all subjects in the enforcement of penal statutes. That interest has been held not enough to justify maintenance of an action by an informer under such a statute. And this would seem sound. For the public interest would be secured sufficiently by the maintainer himself proceeding directly to enforce the law. The second is the case of persons claiming a common interest in the same thing by the same title. These may maintain each other. Here each is protecting an interest of substance of his own. Dr. Winfield shows historically how important this justification was in connection with resistance to inclosures. A third, perhaps, for the matter is not clear on authority, is common religious belief, which may be "a good ground for maintaining a co-religionist in litigation connected with the belief" (p. 75). One must compare with this questions as to interest in the secondary boycott cases and as to interest in privileged occasions of defamation, for it is submitted that all may be unified by a general principle. The fourth is a common commercial interest, of which an example is the claim of individual members of a

corporation to help the corporation itself in litigation in order to protect their individual interests of substance. Fifth, a mere "personal or sentimental interest" in the result of litigation has been held no excuse. Here one should compare the so-called "indirect" interest in trade-dispute cases, which has been considered frequently in the American decisions, and in the secondary boycott cases which have made so much difficulty in the United States. Finally there is the case of maintenance from a sense of public duty. As Dr. Winfield well shows, cases of journalistic enterprise for what are in reality commercial motives do not dispose of this question.

May the eight specific defences and the six cases of "interests of other kinds" be generalized? In attempting to do so we should examine the cases of "abusive exercise of rights," of subjectively manifested injury, of invasions of privacy, of privileged occasions of defamation, of interest in trade-dispute and secondary boycott cases, and, indeed, all cases in which the claim of one to free exercise of his powers, even though involving an incidental aggression, and of the other to freedom from aggression require to be balanced. This is not the place to engage in such an examination. But if we look only at the cases on maintenance, they suggest that the question of a public duty under the circumstances is closely akin to that involved in a defamatory communication in such a case as *Coxhead* v. *Richards* (1846) 2 C. B. 569, and that for the rest securing of an individual interest of substance, of an interest of personality directly and immediately involved (and one's religious faith may well be a precious part of his personality), or of an interest in a relation involving either personality or substance, may be made to furnish a logical basis for all the decisions, allowing for conditions of time and place, and a measure of prediction as to decisions upon new cases.

Two further points as to maintenance call for mention. There is a good criticism of the view of the dissenting minority in *Neville* v. *London Express* [1919] A. C. 368, that if the suit maintained was successful that fact is a defence to the action for maintenance. Also there is a suggestive criticism of the doctrine of the majority in the same case that special damage must be shown. But here also the discussion must go beyond the cases on maintenance and should take account of all the cases of incidental although palpable aggression in the course of self assertion and of self assertion for the immediate purpose of aggression. When one does this it is quite possible to find a general principle to sustain the view of the majority and to

limit the scope of the criticism to the logical difficulties in the Court's position with respect to what damages are recoverable, which are pointed out so acutely.

But perhaps enough has been said to show that this study of what seems at first an obsolete or moribund chapter in the law of torts involves matters of the first importance for the practical study of the law and demands thoughtful consideration by lawyers and judges as well as by teachers.

In the remaining chapters, agreements affecting legal procedure otherwise than by way of maintenance or champerty, criminal conspiracy to abuse procedure, malicious prosecution, abuse of procedure by judicial officers, and preventive remedies against abuse of procedure are taken up successively and in detail. Here for the most part the law is well settled and there is less scope for creative juristic thinking. Dr. Winfield sees rightly that there is no sound reason why an action should not lie for malicious prosecution of a civil proceeding, if it causes damage beyond costs, although person or property was not interfered with. Cases have arisen in America to emphasize this. Nor does the rule appear so thoroughly settled in England that when some such case comes before them the Courts may not find a distinction and allow recovery. But such matters are beyond the limits which the author set himself. Here, as throughout the work, the dogmatic exposition is sure and thorough.

Roscoe Pound.

A TEXT-BOOK OF ROMAN LAW.

THERE have been, and are, good manuals of Roman law in plenty which might seem to render superfluous the publication of yet another. But, after all, they are foreign, and what is more (*vanitas vanitatum!*) however carefully later researches are digested in successive editions, there are changes of point of view which cannot be adopted in this fashion. What one may look for in a new manual is, besides a synthesis of recent work, the *specification* which that work has undergone in the author's mind, also his general point of view and the special qualities which give his work individuality.

In addition to the fact that Professor Buckland's new book [1] is the first general manual in English that will stand comparison on equal terms with the great foreign manuals, it is remarkable for its inclusion of the best results of the researches of the last twenty years, and for its introduction into our studies of the point of view and qualities of an English lawyer. It is a contribution by which the science of Roman law, not only in England, but the world over, will greatly profit. To review for the *Cambridge Law Journal* a Cambridge work of so high an order is a responsibility not lessened by the fact that there has, as yet, been no adequate review of it elsewhere.

The first thing that strikes one in the present work is its deliberate and conscious limitations. The period chosen, from Augustus to Justinian, is a large one, but the choice involves the exclusion of a good deal that is usually understood by "Roman law." We are cut off from the fascinating problems of the primitive law, although the author in more than one article has shown his mastery of that subject. No doubt considerations of space and cost of publication played their part in this limitation, but I take it to be due chiefly to artistic reasons. Mr. Buckland asks us here to be grown-up lawyers, dealing with grown-up law. He will exhibit to us a severely juristic method, which he will not confuse with the historical and comparative methods by which the fragmentary primitive

[1] A Text-book of Roman Law from Augustus to Justinian, by W. W. Buckland, Cambridge, 1921, pp. xiv and 756; 9½×6½ inches, 50s. net.

traditions must be approached. It is a consistent and deliberate demand, scientifically justifiable, but, it must be allowed, depriving the work of completeness as the manual of English students of Roman law.

Beginning with Augustus we stop at Justinian, a less regrettable limitation and more inevitable. We might certainly have had two valuable chapters on the later history of Roman law in the East and in the West, but in the present state of these subjects these could only have contained external and literary history, which is not the sort of stuff Mr. Buckland set out to writ. But, again, this limitation will force us to look elsewhere, this time for an appreciation of the place of Roman law in the world's history. So be it. This work is not a *fervorino*, exciting to the study of the Civil Law. Our interest in it and our realisation of its importance are assumed.

These limitations of period enable Mr. Buckland to advance further in another direction than has yet been done by the author of any general work known to me, namely, the presentment of Roman law, especially the classical law, in full detail and from the purely Roman point of view; and after all this is the central theme in Romanistic studies, as well as the most arduous. What gives to primitive Roman law its central importance? Not, certainly, the richness and variety of our materials, but simply what that primitive law became. Why has the Civil Law survived in Greece to this day, and what, above all, is the explanation of its portentous Western resurrection in the twelfth century? Nothing but the intrinsic value of the compilation of Justinian, and more particularly the supreme juristic method enshrined in the Digest. From the days of Maine we in England have been repeating true things and fine things about Roman law, but they would have been truer and finer if we had known more about Roman law. I conceive of the present work as of a protest, conscious or unconscious, against talking any more about Roman law until we know more about it. Mr. Buckland is emphatically the man to teach us.

Besides the limitations of period there is an harmonious limitation of outlook, to characterize which is more delicate. Let the author speak for himself: "The subject is the law, not the history of the law. But between Labeo and Tribonian there elapsed more than 500 years, and throughout this long period the law was changing, sometimes rapidly, sometimes slowly, but always changing. . . . The method adopted . . . is that

of a narrative treatment, in which, while the system, as a system, is kept in view and forms the main framework of the book, the historical development is also kept in view and the perspective distorted as little as possible. Further, the subject is the Private Law, and little is said of such institutions as the Colonate and the privileged State-controlled trade corporations of later law of which, important as they were in practice, the chief interest is social and political" (pp. vii-viii). To illustrate, take this passage: "There might be no marriage between an adulteress and her paramour, or between Christian and Jew. Two cases are more important. It was forbidden to a high provincial magistrate or his son to marry a person of the province . . . also . . . for a *tutor* or *curator* to marry one who was or had been his ward" (p. 115). Thus it is evident that Professor Buckland judges the importance of institutions (of course, only for his present purpose) by their importance in the system elaborated by the great jurists, from Quintus Mucius to the end of the classical period (p. vii). Not a doubt but that, if the Colonate or the nullity of marriage between Jew and Christian had been treated of by Paul and Ulpian, these topics would have occupied a larger place in our great English text-book. What it sets forth is the mighty technical tradition that unites Labeo with Modestinus and Tribonian, Augustus with Diocletian and Justinian. "The subject treated is the law of the Empire—what is called the classical law—with later developments, including the legislation of Justinian" (p. v).

It is a lawyer's choice, and no soft option, the central theme of Romanistic studies treated in right lawyerly style, with chapter and verse for every statement, and a method that combines a piercing eye for actual application with deep penetration of Roman legal conceptions. The adoption of the only systematic Roman order of topics—that of the Institutes—shows a steady determination to get within the professional technique, and to avoid imposing upon the reader for Roman law the conceptions of later ages (p. ix). It is the modern point of view in our studies, but one more commonly found in monographs than in general manuals. The result, as I have said, is a book in English which gives a fuller and more faithful account of the classical law as a whole, of the real marrow of Roman law, than any book in any language, so far as my knowledge goes.

If a writer would treat of "the classical law with later developments," he is bound to take up a definite position with

regard to one fundamental question—the state of our knowledge of the classical law. The preface tells us that "the state of the study seems to justify a rather freer use of detail than would be necessary or convenient in a treatise on English law" (p. ix). If one wishes for a further development of this point, one must turn to what Mr. Buckland says about the interpolation question (pp. 44 ff.). It is clear from his cautious, but by no means ultra-conservative, expressions that he does not believe that we as yet hold a key, or a bunch of keys, that will liberate the classical essences from the Byzantine storehouse, known as the *Corpus Iuris*. He holds that we are still in the stage when alleged interpolations must be considered in detail in each case. One cannot honestly deny this to be true. Yet I think that in Chapter 1, "The Sources," general historical and methodical considerations affecting this vital question, might have received more notice. For instance, a very important factor in settling it must be the view that we take of the nature of the tradition which more or less preserved the classical law from extinction in the East during the period from Constantine to Justinian. Continuity there was, but legal continuity necessarily means developments by practice. To what extent did Justinian raise a sudden cry of "back to the classics"; to what extent was his work based on scientific preparation, upon decades of patient study and adaptation to actual needs in the law-school of Berytus? These and similar questions should have been raised, though they cannot as yet be answered.

In this respect one notices a definite omission, since the chapter on "Sources" deals mainly with the formal legislative sources, and not with the material sources of our present knowledge. We get nowhere a methodical account of the texts surviving outside the *Corpus Iuris*, including the *scholia* of the *Basilica* and other Greek sources, nor of the editions in which we should seek them. Knowledge of books, especially such knowledge as one detects beneath the author's studious absence of parade, is too rare and precious to be thrown away. Nevertheless, this first chapter is a fine and stimulating piece of work. Only its compression prevents us from approaching it *quasi modo geniti infantes*, a remark which is true of the whole book. The treatment of the popular assemblies is rather summary, doubtless according to plan. On the other hand, the accounts of the Augustan constitution (pp. 6 ff.), of the Senate (pp. 13 ff.), of the functions of the jurists, and of the most famous amongst them (pp. 22-23), are fully satisfying.

Best of all are the discussions of the decline of legal science at the end of the classical period, and of the conceptions *ius civile*, *gentium*, and *naturale*.

Naturally, on so comprehensive a chapter one has certain criticisms of detail to make. There is a slight failure (p. 1, 2) to indicate how largely the accepted arrangement of the Twelve Tables is a modern convention. The existence of territories governed by *praefecti* and *procuratores* below senatorial rank required mention (p. 9), not merely for completeness, but because they were sometimes legal pioneers (*e.g.*, p. 659, 3). Since the appearance of this work Wilcken has published an article (Z. S. S. 1921, 134) suggesting possible inferences as to the provincial edicts generally that may be drawn from the Egyptian materials. *Nihil hoc ad edictum praetoris* our author might properly observe, but the same article (p. 133) will probably cause him to revise his opinion (p. 18) that the better view is that an Emperor's edict failed on his death. The account of imperial rescripts (p. 19; cp. p. 665) would have gained in precision if the author had noticed (the failure to do so is more than pardonable in these days) another article of Wilcken's (Hermes, 1920, 1. *Zu den Kaiserreskripten*). The discussion of the *ius respondendi* will be illuminating only to advanced students. As indicated, we should have liked more bibliography from p. 35 onwards. It is not quite true, as is implied (p. 42), that Justinian only allowed κατὰ πόδας translations of the Digest; he allowed also *paratitla* and *indices* (*Deo Auctore*, 12; *Tanta*, 21). Rotondi's work (Bull. Ist. Dir. Rom. 1913 and 1918) on the *Quinquaginta Decisiones* and the Code deserved a mention (pp. 46-47), as did Ferrini's translation of one of the versions of the *Liber Syro-Romanus*, not least because of its accessibility in Riccobono's *Fontes*.

Chapters 2-4. "The Law of Persons."—The opening section of Chapter 2, taken with those of Chapters 5, 10, and 13, shows Mr. Buckland at his strongest. For me, at least, he has said the last word on the true Roman meaning of the conceptions and distinctions upon which the order of the Institutes is based. Chapter 4 ends with a penetrating discussion of juristic persons (p. 174), and the intervening pages are packed with good things, of which one may mention as most striking the description of the practical effect of liability *de peculio* (p. 66, 13), the short but comprehensive summary of *patria potestas* (pp. 103-104), the acute remarks on *conubium* and *iustae nuptiae* (p. 106), and on the marriage relation (p. 107, 5). Gaius, 3, 43, is not often quoted in connexion with 1, 115b, and 2, 112, but

certainly it must be true that, even before Hadrian's reform, a *liberta* could make a will without a *coemptio*, and therefore probably that an *emancipata* could do the same (p. 120, 2, 3). Lurking in the notes (p. 139, 1, 8) I find the only real criticism of Desserteaux's theories of *Capitis Deminutio* that I have yet seen; indeed, the whole treatment of this topic is greatly in advance of what is given by the usual manuals. The account of *tutor ad certam rem* (p. 153) is very good, and so is the courageous distinction (p. 156) between the cases in which the *tutor* could and those in which he could not act alone. The entire section on *tutela* and *cura* is a model, not least in its handling of modern researches into the degree of care to be exacted of a *tutor*.

I must suppress some of the few criticisms of these three chapters that occur to me, in particular those based on occasionally excessive compression. I have said why the treatment of the Colonate was to be short, and short it is (p. 91). The note on *homologi* (p. 100, 5) is out of date, because the editors of the *Rylands Papyri* (2, 287-288) have pretty well proved that the word really describes "persons who tacitly or overtly have agreed to do something determined by the context." This displaces Wilcken's conjecture (cp. Gothofredus C.T. 11.24.6) that *homologi* means *dediticii*. In the excellent account of *Dos* (p. 107) one misses any attempt to bring this institution into relation with *Manus*. The social importance of divorce would have justified more expansion (pp. 117-118), or, at least, a literary reference, *e.g.*, to Bryce, *Essays*, 2, 281. The remark (p. 118, 8) that in the time of the Twelve Tables the idea of Roman marriage and *Manus* were probably inseparable requires more support than could here be given. Furthermore, English literature is not so rich that a reference (p. 119) to Warde Fowler's study of *Confarreatio* (J. R. S. 1918, 185) would not have been desirable.

Chapters 5 and 6, which are those which the accidents of my own work have led me to test most thoroughly, are so rich in good things that one does not know what to single out for special praise—perhaps the monumental sections, monographic in their detail, upon the law of servitudes. We have noted already the merits of the opening sections of Chapter 5. If the treatment of provincial land (p. 191; cp. *emphyteusis*, p. 275) seems thin, so also is our knowledge. *Elementary Principles* had prepared us for the practical sense with which the working of the *actio Publiciana* is handled. I agree that this remedy cannot be supposed to have superseded *vindicatio* in late

practice (p. 197), though the author seems in his argument to have overlooked the extension of the periods of prescription. The question appears to depend partly on whether the *probatio diabolica* was so very devilish in Roman law, and this I doubt. The author inclines strongly to Ihering's view of "Possession," but I submit that the texts, so far as they supply a general theory, support Savigny. But one must admit that the theory is neither the origin of the concrete rules nor a satisfactory explanation of them. I have never understood why Paul D. 41.2.3.6 is so confidently disposed of as *constitutum possessorium* (p. 204), and I feel much the same about Paul D. 41.2.30.4 (not cited). Gaius 41.2.15 would have supplied a corrective to p. 205, n. 3 (cp. p. 248, 8). The sections on possession close with a profound remark on the place of possessin the Roman system of ideas (cp. pp. 207, 274, 738).

There is one more serious criticism to make on Chapter 5, namely, that proper weight is not given to the influence of Greek metaphysics on the theories of *Accessio* and *Specificatio*. The ideas that a thing loses its identity by incorporation as accessory in a principal thing, and that matter becomes a new thing, *quod antea nullius fuerat*, by being put into a new form, are redolent of conceptualist metaphysics. In *accessio*, especially, their want of harmony with Roman common sense is manifest.[2]

In the account of special titles to *fructus*, the attempted justification of the distribution of titles by *perceptio* and *separatio* strikes one as an isolated piece of Pandectism (p. 222); the reasoning of *Vat. Fr.* 1 as a mere sophism to cover the general decay of the *tutela* (p. 225, 7). As some attention (p. 226, 4) is given to the *rationale* of the *b.f. possessor's* title, Beseler's doubts (3, 129) on the classicality of *pro cultura et cura* might have been mentioned, nor do I believe that our texts on *Traditio* can be reconciled by distinguishing *traditio longa manu* and approximate delivery (p. 229), nor by any theory except one of interpolation.

In Chapter 6 the pithy and exhaustive section on *mancipatio* and *in iure cessio* leave me only to remark that the author (p. 238, 9) makes a stronger case for the view that the five witnesses of a mancipation represented the Servian classes than he appears to think. On *praescriptio l. t.* it might have been noted (pp. 250-251) that Nov. 119, 9 makes the period ten years rising to a maximum of twenty, two years being allowed for

[2] Sokolowski, Philosophie im Privatrecht.

every one of absence in the ten. The usual threefold classification of prescription is more useful than the somewhat confusing historical account here given (pp. 251-252). On servitudes, the complicated modern literature is thoroughly digested and acutely criticized (*e.g.*, p. 265, 11), though there would be citations to add to p. 278, 12 and 13.

In order not to omit all mention of the astonishingly learned Chapters 7-9, one remark may be permitted. We are told (p. 284) that the praetor recognized that the formality of the mancipatory will was useless, but that it was not till late (?) in the classical period that *Bonorum Possessio* under a praetorian will became *cum re*. Now of course actual *mancipatio* cannot have been superseded in Gaius' day by the written record, but it would have been if the praetor had regarded it as useless. The truth seems to be that the production of the writing was treated as *prima facie* proof that the mancipation had taken place, as no doubt it had in most cases, but liable to be upset. It does not appear that this case of *Bonorum Possessio* originated in anything else but a desire to facilitate business.

Chapters 10, 11 and part of 12 deal with contracts. The value of the general opening discussion of terms and classifications has already been appraised; in this topic it is more than usually essential to distinguish the Roman use of such terms as contract and obligation from their closely allied, but significantly different, modern meanings. In treating the problem of consent (pp. 410-411) the author shows himself dissatisfied with the apparent readiness of texts to go behind external expressions and seek out *voluntas*. It may be of interest that more recently the same dissatisfaction has led a German writer (Pringsheim, Z. S. S. 1921, 273) to argue for a strong Byzantine influence in this matter. In all the sections concerned with the general principles of contract the balance is nicely preserved between saying that there were no general principles and constructing a general doctrine at the expense of ignoring not only the differences between different types of contract, but also the practical need and Roman readiness to compromise (cp. p. 421). The manner in which the author clears away the idols of the manuals is well exemplified by his explanation of the nullity of obligations beginning *ab heredis persona* (p. 423). The dethronement of *causa* (pp. 425-456) is something to be thankful for, as is also the comprehensive review of *fiducia* (p. 427).

For the particular contracts one or two observations must suffice. On the view of the attenuation in classical times of the stipulation form here maintained (pp. 432-433), Leo's con-

stitution (C. 8, 37, 10 of 472) must either have abolished the need of question and answer altogether or have been merely declaratory. The latter opinion is the author's choice, but it makes Inst. 3.15.1 simply wrong, whilst the former is almost incredible. There is a third unmentioned possibility, namely that the apparently classical attenuations of form in the Digest are due to interpolations, which were necessary in order to harmonize the classical texts with Leo's constitution.[3] The pre-Justinian texts on writing as proving a stipulation seem to need further examination than they are given; but one can only agree with the conclusions as to Justinian's literal contract (p. 458, 4).

The experiment of reading Sale side by side in our *Text-book* and in Cuq's *Manuel* (1917) is instructive. Apart from the interesting early historical matter in the French work, which of course is not paralleled in the English, Mr. Buckland's account is unquestionably the fuller and more scrupulously exact. He takes note of all relevant texts, with the resulting uncertainties and difficulties, and in literature, even allowing for dates, he is better posted. M. Cuq is more inclined to take one line and ignore other possibilities or qualifications. Thus, of the seller in relation to profits made, after sale but before conveyance, from the thing sold, he writes (pp. 459-460): "Il doit compte . . . des loyers qu'il a touchés," which is the logical result of the doctrine of *periculum* and *commodum*. But Mr. Buckland (p. 485) draws attention to Ulpian D. 19.1.13.11 and other texts, which make the logical view untenable. This contrast is the more significant that M. Cuq's book is itself unusually close to the texts. Again no one would gather from Cuq (p. 459, 3) that the text of Celsus D. 12.4.16 is almost certainly to be corrected, as is duly noted by *Textbook* p. 485, 12. Of course one cannot have it both ways, and it may be true that M. Cuq's account of Sale leaves a clearer impression.

Skipping freely, I think that our author might have mentioned the possibility of Byzantine influence on the theory of *pacta adiecta* (p. 525. Contrast Cuq, p. 510. See now Siber, Z. S. S. 1921, 80), an influence which he fully allows for in an interesting passage on *custodia* (p. 555. Contrast Cuq, pp. 606, 758). I presume it is the limitation of period that prevents him from noticing the Greek analogies which assisted the development of the notion of the delict *iniuria* (p. 585).

The first chapter on Actions (Chapters 13-15) is perhaps the

[3] Riccobono, Z. S. S. 1914, 243.

most brilliant in the book. Once more in the introductory passages dealing with the Roman conception of *actio* and the like we have the author at his strongest. In the general historical survey (pp. 602 ff.) the contrasting of the three successive systems of procedure suggests breaches in the continuity of evolution, an exaggeration not at all in Mr. Buckland's manner and corrected in the sections describing the transitions (pp. 624-625, 658). Later passages also (p. 627, 3, p. 630, p. 658) bring out points which we miss in the general characterization (p. 603), namely, the contractual nature of the two earlier systems and the fact that even the formulary system was not directly coercive.

The limitation of period tells against the interest of the account of the *legis actiones*, which in spite of its brevity is extraordinarily complete, every reasonable view being mentioned or cited, but certain expressions lay perhaps too much stress on the "inexpansibility" of the primitive system (pp. 621-622. Cp. "elaborated by the pontiffs," p. 605). In fact, the author shows a considerable development, mostly by statute (*Leges Pinaria, Poetelia, Vallia, Silia, Calpurnia*), but also by practice (procedure *per sponsionem* 622). And what we know, little as it is, of jurisprudential additions as late as Sextus Aelius (Pomponius D. 1.2.2.7) justifies the belief that the inexpansibility was merely relative to an age of immense development in all directions. No doubt this would also be the author's view, since it agrees with his position (p. 625) in the controversy as to the praetor's pre-Aebutian powers.

The treatment of the formulary system (p. 626) is equally good and remarkably well documented. On the *cognitio extraordinaria* Wlassak's *Zum römischen Provinzialprozess*, which may have come too late to affect the text, yields some important notes (p. 659, 4, 660, 3, 661, 3). The description of procedure under this system seems to require more distinction of periods. In Chapter 14 *compensatio*, taken as a sample, is very plainly and adequately explained, and in Chapter 15 the pages on the Interdicts are what one would have expected from the author of *Elementary Principles*.

The criticisms that have been made are prompted by the feeling that true gratitude for a great and noteworthy book, of which English scholarship may be proud, is best shown by its attentive and critical study. But lest a series of detailed objections may give a false impression of the estimate formed of the book, a few words more may be allowed. In retrospect two special qualities stand out. One is the true lawyer's instinct, which brings every proposition to the bar of practice; for instance, in

reading section ccxxv we seem to be moving through an actual lawsuit. It is a method which brings us sharp up against our difficulties and uncertainties. And that is the other quality, a steady refusal to cover up the gaps in our knowledge with general phrases.

The most original contributions of the book are the sections in which the meanings of Roman terms and classifications are examined. The determination really to think as Roman lawyers thought is the most striking illustration of the practical lawyer-like turn of mind which is shown on every page, but the success with which it is carried out is the result of profound erudition combined with an unusual gift of imaginative speculation. And the labour which has enabled the reader to test every statement by referring to the texts must have been colossal.

Quisquis amore venit nescit se ferre laborem.

F. DE ZULUETA.

WAR AND LAW.

THE publication of a new edition of the late Professor Oppenheim's second volume on *International Law*,[1] which deals with "War and Neutrality," will raise in some minds the question as to the applicability of the maxim *inter arma silent leges*. If it be true, how can there be a law and laws of war?

The question is not a new one, and the view that "war is the negation of law," [2] "that properly speaking there are no laws of war having real existence," [3] which has recently been expressed by two American lawyers may be paralleled by the declaration of the French Admiral Aube that "La guerre est la negation du droit. . . . Tout est donc, non seulement permis, mais légitime contre l'ennemi, c'est la loi." [4] Thus the exponent of the doctrine of "frightfulness" joins hands with the international lawyer, and the former poses as a "Pacifist" on the ground that the greater the horror of war the sooner will it be abolished. In the Preface to Professor Oppenheim's book, Mr. Roxburgh, the editor (for whose admirable work students are truly grateful), tells us how the author would have met the views as to the negation of the laws of war in the late war: "Some notes intended for this preface show with what force he would have argued against the prevalent impression that the war has made an end of the laws of war. Confronted with the many brutal violations of these laws which marred the struggle, he would have argued that in almost every case the offender felt constrained either to deny the charge or to plead justification. This seemed to him to be in itself an admission of the power of the law in normal times. But the times were abnormal, and the laws of war and neutrality were admittedly in partial suspense." In the text of the work, as is well known to students of the earlier editions, the author had dealt with the subject in a section headed "War no illegality" (p. 53), in which he

[1] *International Law*, by L. Oppenheim, vol. ii. Third edition edited by Ronald F. Roxburgh. Longmans Green & Co 1921.
[2] P. Marshall Brown, 12 Am. Journ. of Intern. Law, 162.
[3] J. H. Ralston, 15 *Ibid.* 620
[4] Cited by C. Dupuis, *Le Droit de la guerre maritime* (1899), 346.

pointed out that war is a condition regulated by International Law, as a system of rules to be followed. In the present condition of the law governing the intercourse of States, even since the establishment of the League of Nations, and when States have previously submitted their dispute to an enquiry by the League, it is recognized that war cannot, under existing conditions and the circumstances of the Family of Nations, always be avoided; but when States choose to go to war they must submit to the restraints imposed on them by usage, custom and convention. This follows from the fact that the Family of Nations is a society, the groups in which are aggregates composed of human beings; their acts, even in time of war, are subject to the "encumbrance of moral restraint" which the consent of nations has made part of International Law.[5] Following this view, international lawyers have for many years proceeded to lay down the rules which should govern the relations of belligerents *inter se*, and their relations to neutral Powers and persons when private right is vindicated.

There appears to be a growing feeling against this treatment of this matter, as being based on the principle of the unlimited right of States, by virtue of their independence, to make war at their will.[6] The old cry of "Back to the texts" is being taken up as meaning "Back to Grotius," by whom the right of war was assigned to States in order to punish a State as a criminal who had violated the right of other States.[7] To Grotius war was a real sanction to be made use of only as a penalty for the violation of international right, and it was perhaps this feeling that led thousands to flock to the Colours to punish the disturber of the peace in 1914. It was this principle also that lay behind the insertion of the penal clauses in the treaties of peace in 1919. A law-breaker must be punished.

The idea underlying the Covenant of the League of Nations is in line with this development of thought, and seeks to lay down principles by which the justice of a war may be appreciated. By Article XVI., should any member of the League resort to war in disregard of its covenants under Articles XII., XIII., and XIV., it shall *ipso facto* be deemed to have committed an act of war against all the members of the League, which thereby undertake immediately to subject

[5] W. E. Hall, *International Law*, § 17; J. Westlake, *International Law*, vol. ii, 56.
[6] L. Oppenheim, op. cit. 66.
[7] C. van Vollenhoven, *The Three Stages of the Law of Nations* (1919).

it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not.

Even before the Covenant of the League of Nations was formulated, the Second Hague Conference had essayed something on the lines of recognizing the right of a State to use force against a law-breaking State to redress an international wrong. The Second Hague Convention of 1907, respecting the employment of force for the recovery of contract debts, though it has a limited ambit, emphasizes the important distinction between forcible measures taken before and after arbitration or attempts to arbitrate. The justice of the use of force is recognized as between the contracting parties where the debtor State refuses or neglects to reply to an offer of arbitration, or after accepting the offer, renders the settlement of the *Compromis* impossible, or after the arbitration, fails to submit to the award.[8] The defaulting State becomes a law-breaking State, against which force may justly be employed, if necessary.

To-day, there is a movement in the direction of denying both the legitimacy of war and of the rules which by custom and convention have come into being to regulate its conduct; but it will be remembered that the Second Hague Conference, while condemning the use of force in a special case without previous resort to a judicial examination of the matter at issue, devoted much of its time to the framing of laws of war. Article XVI. of the Covenant of the League permits the use of force in the last resort against a covenant-breaking State, and recognizes its existence in other cases, where the requirements of the Covenants have been complied with. It would seem that, should the League become world-embracing, if war is undertaken under its sanction, the laws relating to neutrality will cease to operate,[9] or become negligible, or neutrality will once more occupy the place assigned to it in the Grotian scheme. To the neutral, Grotius assigns the duty of doing nothing which may strengthen the side which has the worse cause, or which may impede the action of him who is carrying on a just war, and in doubtful cases he is to act alike to both sides in permitting transit, in supplying provisions and in refraining from helping places besieged. Grotius advises the neutral to make a convention with

[8] A. Pearce Higgins, *The Hague Peace Conferences*, 180-197.
[9] International Law Association, Report of 39th Conference, 1920, 208.

each of the belligerents, so that he may be allowed with the good will of both to abstain from war and to exercise towards both the common duties of humanity.[1] "Neutrality," said President Wilson, in reference to the circumstances of the late war, "is no longer feasible or desirable where the peace of the world is involved, and the freedom of its peoples." In a League war there may be no place for neutrals, for it is clear that the Covenant contemplates that every means will be used against the covenant-breaking State to bring it to justice, and there will be no question as to the legality of such means as economic blockade. Already there is a feeling that the Covenant needs reforms in various directions, and at the Second Assembly of the League held in September, 1921, Article XVI. was submitted to a searching examination. The obligation imposed by this Article, together with those imposed by Article X. are the great obstacles to the acceptance of the Covenant by the United States. Several amendments of Article XVI. were proposed and accepted pending formal ratification; the result being economic blockade is only to be imposed if, by a unanimous vote, the Council of the League decrees it, and fixes the date.

I fear, however, that we are still a long way from the attainment of the ideal predicated both by Grotius and by the Covenant of the League. Grotius' system had defects which the Covenant seeks to remedy, namely: the lack of an impartial judge, and of the *criteria* for determining the justice of a war in vindication of a private right, and the absence of an unbiassed avenger of the wrongs of a State.[2] The Covenant makes a breach in the hitherto accepted doctrine which implied the unlimited liberty to declare war; it provides the mechanism for an improvement in international relations, if States will only avail themselves of it. I think, however, that the machinery is too complicated, and may, unfortunately, be found at a crisis to move too slowly. But neither the Covenant of the League, nor the American project for an Association of States, can produce the essential conditions on which alone war can be abolished. Harm, rather than good, is done to the cause of humanity by the advocacy of principles which tend to the removal of all restraints on the actions of belligerent States, both *inter se*, and as regards neutrals. Progress does not, in my view, lie in that direction, but in removing the basic causes of war.

Instead of denying the existence of the laws of war as part of the Law of Nations, it should be realized that the Inter-

[1] *De jure belli ac pacis*, iii, c. 17.
[2] C. van Vollenhoven, op. cit. 72-75.

national Society is following the course of evolution by which orderly government was developed in the National Society itself, and a stage has now been reached which may mark a real step forward towards the goal which the deniers of the legitimacy of war and of the existence of the laws of war ardently desire to reach. But progress cannot be hurried, though it may be assisted. Usage and custom have in the past had as their sanction the public opinion and conscience of civilized humanity, but they have too often been slow to act, and have sometimes failed when greatly needed. The peaceful means of settling disputes between States in a legal manner have long existed alongside of the violent methods of self-redress just as they co-existed in the early stages of the development of municipal law; but they have been inadequate, the organization was incomplete, the compelling force was not always present. Nevertheless, it was a distinguished sailor, and not an international lawyer, who said that the submarine campaign of Germany in the late war "provided, perhaps, the finest vindication of International Law in history."[3] The Law of Nations slowly, but surely, asserted itself in the late war by rousing more than twenty States to take action against a Power which was then violating those fundamental principles of humanity which lie at the base of the customary and conventional rules regulating the conduct of war.

The chief aim of International Law must be to provide peaceful solutions for all differences between States, and remedies for any States that have suffered international wrong. The establishment of the League of Nations and of the Permanent Court of International Justice mark a further progress towards the fulfilment of those needs, but States, like individuals, must be made to feel that it is worth their while to resort to the League or the International Court, rather than rely on their own strong arm. It took centuries before the King's Peace ultimately prevailed in England, and even now, self-help under legal restrictions still may be resorted to in some cases.

So long as war exists, the need for regulation and restraint imposed by the whole body of States remains, but changes both in the attitude of neutral States, and in the form of the laws of war appear to be necessary. Neutrals must be in deed and in truth the guardians of International Law, and law-breakers must be made to realise that they will have to answer for their crimes. The "Root" resolutions on the laws of naval warfare adopted at Washington by Great Britain, France, Italy, the United States,

[3] Rear-Admiral S. S. Hall, *Grotius Society's Transactions* (1919), 84.

and Japan, on the 6th January, 1922 (which will probably be known hereafter as the Declaration of Washington) after declaring the rules as to attacks on merchant vessels which are to be deemed to be an established part of International Law, provide that "any person in the service of any Power who shall violate any of those rules, whether or not such person is under the orders of a governmental superior, shall be deemed to have violated the laws of war, and shall be liable to trial and punishment as if for an act of piracy, and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found."[4] At the time of writing, these rules lack ratification, but should the Signatory Powers ratify, and "all other civilized Powers express their assent," as they are to be invited to do, there will be provided a definite sanction for the breach of important rules of war which will not necessarily be applied by any one of the belligerents. These rules afford a clear piece of evidence that the greatest naval Powers in the world recognize the existence of International Laws of War. The last Article of the Declaration further refers to the "requirements universally accepted by civilized nations for the protection of the lives of neutrals and non-combatants," and in inviting all other civilized Powers to express their assent to the statement of established law, the Signatory Powers do so, in order "that there may be a clear public understanding throughout the world of the standards of conduct by which public opinion of the world is to pass judgment upon future belligerents."

This Article contains a direct appeal, passing by the Foreign Offices of States and going straight to the peoples by whose votes Foreign Ministers are maintained in power under modern democratic forms of government; it is a direct and powerful call to mobilise the moral forces of the world in defence of humane principles in war.

But the Washington Declaration further recognized the existence of International Laws of War by the agreement which the Powers there arrived at to appoint a Commission to investigate the question whether the existing laws of war are adequate for the new agencies of warfare which have come into use since the Hague Conference of 1907, and if they are found not so to be, to formulate new rules. The members of the Commission will do well to study the third edition of Oppenheim's International Law, in which the events of the late war are dealt with in so far

[4] American Association for International Conciliation, Pamphlet No. 172 (March, 1922), p. 77.

as they illustrate, extend or challenge the general principles hitherto accepted. Should their examination of the question lead them to recommend the framing of new rules, it is sincerely to be hoped that the mistakes of The Hague and London Conferences will be avoided. The laying down of minutely detailed rules is to be deprecated, but the declaration of principles may be of great value. It must be frankly admitted that many of the well-meant efforts of the past to formulate the exercise of belligerent rights have not met with success. This may be attributed partly to inadequate preliminary preparations on the part of the delegates, partly to a failure to appreciate the conditions under which war would be carried on, and partly to the invention of new methods and instruments of warfare.

"It is almost a truism to say that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or States, a whole in which the enemy too is comprised, so that duties arising out of larger citizenship are owed even to him."[5] There is no doubt that in the past this common sentiment felt by all seafaring men did much towards maintaining a high standard of chivalry in naval warfare, and the interposition of judicial proceedings in all questions relating to the capture of property at sea has enabled principles to be evolved and applied in a manner impossible in land-warfare. What appears to be called for is a declaration of principles relating to both sea and land warfare, of the means of securing their proper execution, and the punishment of offenders against them.

M. Paul Fauchille, in the last chapter of his recently-published great work on war and neutrality,[6] discussing the International Law of the future, draws attention to the fact that the Treaty of Versailles, as well as containing the covenant of the League of Nations, also contains the Chapter on Penalties (Articles 227-230) providing for the trial of the ex-Emperor William the Second, and of all persons accused of having committed acts in violation of the laws of war. He is of opinion that all nations should proclaim in a solemn convention that a war begun and carried on in contravention of the recognized principles of the Laws of Nations should involve the *personal* responsibility of those who are guilty of such violations; both the holders of the sovereign power who ordain, authorize, or permit the commission of acts contrary to law, and all who take

[5] J. Westlake, Collected Papers, 274.
[6] *Traité de droit international public* (1921), vol. ii, ss. 1711-1721.

part therein, who should be brought to trial before a high international tribunal with power to order punishments of a peculiarly rigorous nature. Such tribunal must, he urges, be composed not only of representatives of the belligerent States, but of all States, so that the accused cannot aver that its decisions are inspired by any idea of vengeance. *Alors, règnera une rigoureuse justice.* But M. Fauchille is not blind to the difficulties which are involved in this scheme; he realises that for its success there is required such *un principe de la solidarité morale et materiélle des pays civilisés* as cannot as yet be said to exist. This is the crux of the whole matter which municipal law has had to overcome and has overcome, but which has still to be surmounted by the Law of Nations.

The way of progress in international relations lies in the fuller realization of International Law as an active and effective power in the world, and the provision of impartial, speedy and certain justice according to law. War will then become a great international crime unless undertaken as a means of punishing a delinquent State. But states are not yet prepared to limit their right to make war only for the purpose of executing the sentence of a World-Tribunal. There is, at present, little evidence of the existence of such a state of mind in any of the nations, and in the prevailing conditions of variability of civilization, culture and moral standards in the different members of the Family of Nations it must be confessed that such cannot be hoped for in the near future; but this is the ideal for the future of the States of the world and of International Law to govern their relations, and it is an ideal worth working for.

A. Pearce Higgins.

CONTRIBUTORY NEGLIGENCE.

IN an article on "Contributory Negligence" in the January number of the *Law Quarterly Review*, the learned writer, Lord Justice O'Connor, draws attention to the state of confusion which a study of recent cases reveals as reigning with regard to this subject, and concludes by suggesting that the bare question should be put to the jury, "Whose fault was it?". This article is not intended as a criticism of that thesis. But if the condition of principle is such that experience suggests its total abandonment, it is surely high time that Theory bestirred herself. The following observations constitute an attempt to apply the current formula to a particular class of cases—those namely which may be described as collision and running down cases—with the intention of showing that the formula does adequately cover the cases.

The accepted formula is taken to be that laid down by the House of Lords in *Grayson* v. *Ellerman*, [1920] A. C. 466, in the form of three questions to be left to the jury:—

1. Was the defendant negligent?
2. Was the plaintiff negligent?
3. If both parties were negligent, could the defendants in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened?

Now it may be observed at the start that this formula does not attempt to apportion degrees of negligence. Wisely or unwisely, the Common Law places either the whole burden of responsibility, or none at all, upon the defendant; the ground of liability being that his act was the proximate—the effective—the decisive cause of the damage (*The Bernina*). Further, the law does not profess to estimate moral blameworthiness. The goal of any enquiry into the subject of contributory negligence must be to discover the proximate or decisive cause of the damage.

The first step on the road seems to be the drawing of a distinction which may be said rather to underlie than actually to be expressed in the cases, but which has now been explicitly drawn in the case of *The Volute*, T. L. R., December 21, 1921: the distinction namely between cases where the negligent acts of

the parties are *successive*, and cases where they are *simultaneous* By cases of successive negligence is meant cases where the negligence of one party has ceased to be active before the negligence of the other party operates upon it; cases that is where one party has ceased to have any power of action, and consequently of avoidance, before the negligence of the other party has produced the crisis. Whereas in cases of simultaneous negligence, both parties continue to have a power of action, and so of avoidance, right up to the occurrence of the catastrophe. It is not suggested here that the difference is one of principle, nor that it requires a difference of formula; but that the distinction is a convenient one for the purpose of applying the formula to facts.

To deal first with cases of successive negligence—The doctrine of "the last opportunity" can be applied here without difficulty. We may conceive of the facts as follows:—A. has by his negligence created a certain state of affairs; the negligence of B. then acts upon that state. Inasmuch as A. has ceased to be an active agent, and has lost all power further to influence the result, the conduct of B. alone is to be considered. If then B. has an opportunity, by the exercise of ordinary care, to avoid the results of the negligence of A., and fails to make use of that opportunity, B.'s negligence is the proximate cause of the damage that ensues, and the negligence of A. is merely an inducing cause. If B. is defendant, he is liable: if he is plaintiff, he cannot recover. The former case is exemplified by *Davies* v. *Mann* (the donkey case), and *Radley* v. *L. N. W. R.* (the shunting case). The latter is exemplified by *Butterfield* v. *Forrester* (the case of the pole across the road).

In these and similar cases the application of the rule is straightforward. But there would appear to be less obvious cases of successive negligence where the same reasoning applies. Let us suppose, for example, that A. is negligently driving a car along a street, and that B. negligently steps off the pavement in his path. The act of B. is, for purposes of the law, complete on the instant, and he has no further power of influencing the result. The conduct of A. alone is thereafter to be considered. If A., by the exercise of the care reasonably to be expected of a man in such circumstances, can avoid B., then failure to do so will render him liable. If he cannot so avoid B., he will not be liable. Any other decision would, it is submitted, be to establish a doctrine of *caput lupinum*.

A similar state of facts may be mentioned which actually came before an American Court. A woman was negligently crossing

a ravine by the trestle bridge of a railway, when a train ran her down. If it be held, as it was, that it was negligent of the driver not to keep a good look-out, then the case is one of successive negligence; since once the woman had entered on the bridge she had no further power of influencing the result.

It may then, it is submitted, be taken as established, that whenever the facts can be so construed, that the negligence of one party produces a state of affairs, upon which the negligence of the other party acts, the rule of the last opportunity is to be directly applied.

Let us pass to cases of simultaneous negligence; the difficulty of which lies precisely in this, that both parties continue to have, until the actual catastrophe, an opportunity of avoiding it. The simple type of such cases may be taken to be that of two cyclists, A. and B., who collide while riding negligently in opposite directions. In giving judgment in the Admiralty case of *The Volute*, the Lord Chancellor remarked *obiter* that in this class of case there is never any liability at Common Law. It is submitted with respect that we are not at liberty to adopt any such simple rule, at any rate if we accept the decision of the Judicial Committee in *British Columbia Electric Ry. Co.* v. *Loach*, [1916] A. C. 719.

In such a case as that of the cyclists, four states of fact are possible with respect to their perception of the danger. Either A. alone becomes aware of the danger before impact; or B. alone; or both become aware; or neither.

In the last case, it seems self-evident that there is no liability. For neither has had any opportunity which was denied the other. And this is the case irrespective of any question of moral blameworthiness, as for example if one were a motorist and the other a cyclist. In the eye of the law, they stand upon equal terms; the proximate cause of the damage is the combined negligence of both, and the loss will lie where it falls.

Let us consider next the case where the defendant alone becomes aware of the danger before impact. This is not a case of successive negligence, at any rate *prima facie*, for the plaintiff remains an active cause throughout, and has an opportunity throughout of perceiving the danger and taking steps to avoid it. The difficulty of applying the rule of the last opportunity is obvious; how can we say that the defendant has any opportunity of avoidance which is denied the plaintiff? Yet it is submitted that this rule is the correct one to apply to such facts. What is required is a point of time at which we can say—Now, the introductory events are complete, the stage is set; whatever neglect

of opportunity occurs from this moment is proximate to the damage; whatever went before is inducing cause and no more. How are we to determine such a moment? Let us see if the accepted formula will give us any help.

The part of the formula to which we naturally turn is the words "in the result" contained in Question 3. They are evidently emphatic, or Question 3 would conflict with Question 1. May they be paraphrased as "at the crisis?" It seems they may, at any rate for our class of case. The formula does contemplate a point of time before which all negligence is an inducing cause, and after which it becomes proximate cause. A particularly instructive case is *Loach's Case* before-mentioned. The phraseology in favour, it seems in Canada, and adopted by Lord Sumner in giving judgment, is "primary or original" negligence as contrasted with "ultimate or resultant" negligence. But we are still faced with the problem, when can the "crisis" be said to have arisen?

It is submitted that the crisis arises when the defendant becomes aware of the danger, or of facts which should indicate immediate danger to him. (Awareness of the plaintiff will be considered later.) If neither party becomes aware, then, as has been said, neither party has an opportunity which is denied to the other; consequently for our purpose no "crisis" arises before the actual catastrophe. But if the defendant becomes aware of the danger before the accident has occurred, then that is the time at which the crisis arises and the formula is to be applied. Any negligence of his before that time is "primary or original" negligence and an inducing cause; any active negligence of his after that time is "ultimate or resultant" negligence and a proximate cause. If therefore "in the result," that is, on becoming aware of the danger, the defendant could, by the exercise of ordinary care and diligence, have avoided the damage, he is responsible for it; if he could not then have avoided it, he is not responsible.

The clearest example is the case of the tram-driver who saw a pedestrian crossing the rails in front of the tram, but expected him to see it and did not pull up. There is a similar Irish case, *Smith* v. *Brown*, 28 L. R. I. 1, complicated by the fact of the plaintiff being deaf. But this type is not one which is likely to occur often in practice without the presence of one or more of the additional complications which will soon be discussed. Let us deal first with two possible objections to what has already been said.

The first is, that this is to penalise awareness—to penalise the defendant for having been less negligent than the plaintiff. But this does not seem to be sound. The defendant, if he is penalised at all, will be penalised, not for his awareness, but for failing to make use of the opportunity his awareness provided him with. If a man has clear warning of the impending consequences of his negligence, and nevertheless continues in it, he is rightly held responsible.

The second objection may be stated thus:—Should we not say that what the plaintiff *ought* to have been aware of is equivalent in law to what he *was in fact* aware of? Is not negligent failure to be aware equivalent to awareness?

It is submitted that this objection is founded on a misconception. The question we are discussing does not seem to be the question which has been thrashed out by American Courts, whether any distinction can be admitted between "conscious last chance" and "unconscious last chance." We may grant that once the existence of a last chance is proved, as existing for the one party but not for the other, then such a distinction is not sound. But the present enquiry relates to states of fact in which both parties have, *prima facie*, an opportunity, if they become aware of the danger, to avoid the accident; and the only ground of distinction between them is that one does in fact become aware of the danger while the other does not.

If then, on becoming aware of the danger, the defendant has an opportunity to avoid the damage, failure to avoid it will make him liable. And conversely, if the plaintiff alone becomes aware of the danger, he clearly cannot recover. For either he and the defendant stand upon equal ground, or his footing is worse than that of the defendant. It should be noticed that no fourth question, applying the test to the plaintiff, is necessary on these facts; since Question 3 will of itself indicate the only circumstances in which the plaintiff can be made liable.

There remain more complicated cases to be discussed. The first is where both parties become aware of the danger. Now, if what has been advanced above is sound, it will be apparent that it is only such awareness as allows an opportunity, by using reasonable care, to avoid the damage, which is a possible ground of liability. That is why the distinction between simultaneous and successive negligence does not appear to be one of principle, but of the application of the principle to facts. For the operation of the formula in cases of simultaneous negligence is precisely to eliminate what may be called "nude" awareness (awareness not clothed with opportunity), and so to reduce the

more difficult cases to the footing of the more simple—the cases of successive negligence.

To resume, then, we may disregard any awareness of the plaintiff which does not provide him with an opportunity of avoiding the accident. And we have already seen that the formula will eliminate any similar awareness of the defendant. Therefore, in order that the awareness of the plaintiff should be of importance, we require a very special state of fact—namely, that both parties shall, on becoming aware of the danger, have an opportunity of avoiding it. This we may suppose will be rare in any class of case; but it will be particularly rare in cases of running down and collision. It requires among other things a certain hardihood in the plaintiff in the bringing of his action. But if such a case should arise, it seems clear that as both parties are on an equal footing, the defendant should not be held liable. To meet such a case, therefore, we seem to require a fourth question for the jury, "Could the plaintiff in the result have avoided the accident?", to be put only if the answer to Question 3 is in the affirmative, and, of course, only if there is evidence on which the jury may reasonably answer it, too, in the affirmative. And if they do so, the plaintiff should fail. Judicial opinion is not altogether wanting for such a suggestion.

A final question may perhaps be considered—a question of considerable difficulty, and one which may well recur fairly frequently in collision cases. It cannot be better indicated than by stating the facts in *Loach's Case* already referred to. Here a waggon was being driven across an electric car line. The driver of the waggon negligently failed to observe the approach of a car. The driver of the car perceived the waggon at a distance of 400ft., and immediately applied his brake. Had the brake been in good order, the car would have been stopped in time; but owing to a previous negligent omission on the part of the Railway Company's servants, the brake was out of order and the car dashed into the waggon.

Now, according to our test, the negligence of the Company's servants must be judged at the time when the driver of the car perceived the waggon and applied his brake. The cause of the brake being out of order was a previous act of negligence—must we therefore say that the Company had not within our rule an opportunity of avoiding the accident? The Judicial Committee of the Privy Council held no; a decision which may be justified under our rule. For the faulty condition of the brake did not become an active factor in the case until the crisis had arisen. Lord Sumner, in giving judgment, quoted with approval the

following passage from a judgment by Anglin J. in *Brenner* v. *Toronto Ry. Co.*, 13 Ont. L. R. 423 (a passage quoted here because it so well illustrates the application of the rule of the last opportunity to this class of case):—"If, notwithstanding the situation, efforts to avoid the injury duly made would have been successful, but for some self-created incapacity which rendered such efforts inefficacious, the negligence that produced such a state of disability is not merely part of the inducing cause, it is in very truth the efficient, the proximate, the decisive cause of the incapacity and therefore of the mischief."

It would appear, then, that the doctrine of contributory negligence at present accepted does adequately cover, at any rate, cases of running down and collision. It has been objected that the doctrine is a source of confusion to juries; and the writer is well aware that this article will do nothing to dissipate that impression in the mind of the reader. But it is submitted that this is not the fault of the doctrine. The complexity arises, not from any attempt to apply the doctrine to a particular case, but from the attempt to construct ideal categories which shall include all possible states of fact. Contributory negligence will never be an elementary department of the law; and any attempt at simplification is likely to lead to more injustice than it avoids.

J. C. Macintosh.

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[At our request the following account of the changes in the Law Tripos and in the Regulations for the degrees of LL.B., LL.M., and LL.D., has been written by Mr. H. A. Hollond, Fellow and Law Lecturer of Trinity College and Reader in English Law in the University, who has done a large part of the work of drafting the new regulations.—ED.]

THE REVISION OF THE LAW TRIPOS.

ON March 4, 1922, the Senate approved a grace giving effect to certain recommendations of the Special Board for Law regarding the Regulations for the Law Tripos and the conditions for proceeding to the Degrees of Bachelor, Master, and Doctor of Law. It has thereby inaugurated a new era in the history of the Cambridge Law School.

The course of study which was instituted in 1887 was based upon the principle of the division of the Tripos into two Parts, the subjects of which were distributed with a view to their being used to the best educational advantage. But it was intended that the two Parts should be to this extent independent, that a man who had taken Part I. of another Tripos was not seriously handicapped when he embarked in his third year on

study for Part II. This valuable feature is maintained in the new scheme, which in its essence carries forward the development of Cambridge legal studies along lines which were contemplated by some of the reformers of 1887, but for which general opinion was not then ripe.

The curriculum for the new Part I. contains as at present the subjects of Roman Law, Constitutional Law, and Public International Law. But in the case of Roman Law a portion of the Digest will no longer be prescribed, and the amount of the Institutes, both of Gaius and of Justinian, in respect of which knowledge of the Latin text is to be required, is curtailed. The scope of the examination in Constitutional Law is being defined in such a way as to avoid the danger of inducing the student to memorize matters of administrative detail. One important change of substance is made in Part I. The fact has become clear that it is undesirable to examine a student upon such matter as is contained, for instance, in Salmond's *Jurisprudence* when he has no acquaintance with English case law. Jurisprudence is therefore replaced by English Criminal Law, which can conveniently be studied side by side with Constitutional Law, and which teachers have found particularly attractive to beginners and adapted to the training of their reasoning faculties.

The teaching for Part I. will be put on a sounder footing than at present by the institution of a University Qualifying Examination at the end of the first year, which will be obligatory on candidates for Part I. who have not already passed an Honours Examination. This examination will eliminate those who, on embarking upon a subject their capacity for which has not been tested at school, are found to be unfitted for pursuing an honours course. Its programme—Outlines of Roman Private Law (with emphasis on Property and Obligations), the History of Roman Legislative and Judicial Processes, English Constitutional History from the Norman Conquest to the Act of Settlement, and the History of Modern International Relations—will ensure the laying of sound foundations in three of the Part I. subjects.

The existing Part II., the English Law Part, of the Law Tripos, was envisaged by its originators as a two years' course of study, and as such possessed many merits. But it was natural that students in law should object to spending four years in qualifying themselves for the B.A. degree, when the normal period of study for that degree in other subjects was three years. Many of them therefore resorted to systematic cramming in their third year, and by this method succeeded in obtaining a surprisingly high standard of examination proficiency in that time.

The experiment now introduced is that of narrowing the field of the work for Part II. to such a compass that it will be possible

for students to cover it in a scholarly manner in one year, and also reasonable for examiners to insist upon proof of a more deeply-rooted knowledge than is possible under present conditions.

The basis of the new Part II. course is three main subjects of English Private Law—the Law of Property, the Law of Contract, and the Law of Tort. The first of these subjects will be defined so as to call for a knowledge of those basic principles only which are the necessary premises to the understanding of any question of Property Law. In order to ensure that the historical and analytical aspects of these three subjects are not neglected by students, there will be separate examination papers in English Legal History and in Jurisprudence.

The lightening of the burden in Part II. is accompanied by the removal of an anomaly which has long been a cause of reproach to the University, that of giving two degrees for a three years' undergraduate course. After the year 1925 it will no longer be possible to obtain both the B.A. and the LL.B. degree by passing both Parts of the Law Tripos, or one of those Parts in addition to an honours examination in another subject. Under the new regulations the B.A. degree will be so obtainable, but the LL.B. degree will be awarded on a more advanced examination in a subsequent year.

In the LL.B. examination there will be a compulsory section comprising a subject in Comparative Law. The study of a topic such as the Law of Sale as developed in the Roman and English systems respectively is likely to be increasingly valuable as some acquaintance with the leading principles of the commercial law of other countries becomes more and more desirable for English lawyers. In addition to this section the candidate will take one of three alternative sections, one comprising exclusively English Law, another Roman Law and Jurisprudence, and a third International Law. There will be three papers in each of these three alternative sections, each paper being devoted to a special subject prescribed by the Law Board. A candidate for the LL.B. examination will be required either to have passed one Part at least of the Law Tripos, or to have proceeded to the B.A. degree and have become qualified to practise as a barrister or solicitor in England or Ireland, or as an advocate or law agent in Scotland. Residence for a longer period than the normal nine terms will not be obligatory, but it is hoped that many men will find it worth their while to remain a fourth year in residence and avail themselves of the teaching provided in the Law School.

The policy of narrowing the scope of the examinations will set teachers free from what has hitherto been a grave handicap, and will enable them to aim at developing the reasoning powers of students rather than at ensuring their acquaintance with a large number of rules in concentrated form.

In preparation for the practice of the law it is not the accumulation in memory of rules which counts: the technique of finding these upon occasion is acquired by experience. The way to lawyerlike thinking lies through the development of the faculty of extracting the governing principles from the reports of decided cases and of selecting by means of the comparison of competing analogies the principle most relevant to the facts under consideration. It is this faculty of induction and this sense of relevance which the pupil acquires in chambers. But his opportunities of doing so are unsystematic, depending, as they do, on the subject-matter of the briefs which come in. The necessary training cannot be got by memorizing text-books, however lucid: it is this obvious fact which makes practitioners contemptuous of legal education. But it can be got, as the great scholars who built up the Harvard Law School have proved, by applying systematically in the class-room the methods of chambers. If the reports are made accessible to the student in collections of cases grouped according to subject and in a selected order, he can be made to extract the principle for himself from a number of decisions and then to apply it, under the guidance of the teacher, to hypothetical situations. In this manner so much of the legal field as is considered necessary can be explored scientifically.

The efficacy of this method, which is no novelty, associated as it has been for centuries with the name of Socrates, has been proved in the United States not merely by the quality of the scholarly articles of American law periodicals, but by the eagerness with which legal firms compete for the services of men who have obtained high marks in their law school examinations.

It would be misleading to suggest that Cambridge law teachers have not been alive during the past twenty-five years to the advantages of this system of training. They have been prevented from applying it to the full by the nature of the curriculum and of the examination. The system requires the outlay of much time not only in research on the part of the teacher, but also in the patient building up of conclusions on the part of both him and his pupils. We, who have to prepare students in one year for an examination which ranges over too large a part of the field of the law, are often obliged to shirk some of the really vital spade-work, and to content ourselves with a top-dressing which produces immediate returns in a certain sort of examination, but stores up no reserve for drawing upon in the future.

The scholarly teaching given here in the past even under these difficulties is of happy augury for the prospects of the Cambridge Law School. We have the material in the shape of students of good quality. We have, thanks to the labours of the Emeritus Downing Professor, Dr. Kenny, the necessary

apparatus of case books in several of the subjects: if the revised curriculum does not enable us to produce results which evoke the respect and support both of the legal profession and of scholars in other subjects, it will be we, the present generation of teachers, who will have been found wanting.

Two important innovations call for mention. A paper on a portion of Roman-Dutch Law may be taken as alternative either to the paper in Legal History or to the paper in Jurisprudence in Part II. of the Tripos. A similar option will be given to candidates for the LL.B. examination. The Law Board are anxious to meet as far as possible the requirements of students from the Union of South Africa, and have in this connexion placed on record their appreciation of the provision generously made for the time being for the teaching of Roman-Dutch Law by the Master and Fellows of Gonville and Caius College by means of the Monro Lectureship. The opportunity of meeting a real need of the University by a permanent endowment of the teaching of Roman-Dutch Law, and a provision of books in that subject, is one which may be earnestly commended to those who have the inclination and the means for helping to draw tighter the bonds that link South Africa with Great Britain.

The University has given frequent proof in recent years of its desire to attract students from other Universities to do advanced work in Cambridge. The provisions now made for the study of law by affiliated students are in keeping with this policy. Normally an affiliated student will be able to obtain both the B.A. and the LL.B. degrees after three years' work, and in cases in which such a student gives evidence of possessing sufficient previous legal qualifications he will be able to qualify himself for the LL.B. degree after two years' residence.

The amendments made to the regulations for the degrees of LL.M. and LL.D. remain to be noticed. In future, subject to the reservation of existing rights, it will be necessary for an applicant who submits a thesis with a view to the LL.M. degree to be a Bachelor of Law. On the other hand, a candidate for the LL.D. degree will not be required previously to have taken a law degree, as the sufficiency of his legal attainments is ensured by the provision that he shall have given proofs of distinction by some original contribution to the advancement of the science or study of Law, and that a substantial part of his work shall have been published.

H. A. Hollond.

NOTES ON RECENT CASES.

NATIONALITY—DIVESTMENT DURING WAR—"NATIONAL" IN TREATY OF PEACE—BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914.

In re Chamberlain's Settlement; Chamberlain v. *Chamberlain.* [1921] 2 Ch. 533. *Fasbender* v. *Attorney-General.* [1922] 1 Ch. 232.

IN these cases further consideration was given to the principles established in *Rex* v. *Lynch* [1903] 1 K. B. 444, and *Rex* v. *C. O. 30th Batt. Middlesex Regt., Ex parte Freyberger* [1917] 2 K. B. 129.

A fund was vested in the plaintiffs in the former summons as trustees, to invest and pay the income to the defendant during his life or until he should become bankrupt or assign or charge it or "until some other event should happen . . . whereby the said income or any part thereof if belonging absolutely to him would become vested in or charged in favour of some other person or persons or a corporation"; and, in the event of determination of this trust during the life of the defendant, to apply the income during the rest of his life, at their discretion, for the benefit of the defendant and certain other persons.

The defendant was a natural-born British subject, but during the war he obtained a certificate of naturalization as a German. It was admitted that by German law he thereby became a German subject.

By the Treaty of Peace, 1919, Article 297, and the Treaty of Peace Order, 1919, s. 1, cl. xvi., the property within His Majesty's Dominions belonging to "German nationals" at the date when the Treaty came into force—namely, January 10, 1920—was charged with certain payments, and by section 2 of the Order the expression "nationals" in relation to any State was to include for the purposes of the Order "the subjects or citizens of that State . . . according to the law of that State."

Under these sections it was held by P. O. Lawrence, J., that the defendant was, for the purposes of the Order, a German national, and that the income of the trust would accordingly have been subjected to a charge, if it had belonged to him absolutely. The trust in favour of the defendant was therefore determined on January 10, 1920, and the subsequent income was to be applied to the discretionary trust.

This decision in no way conflicts with those in *R.* v. *Lynch* and *Ex parte Freyberger.* By English law a British subject cannot by naturalization or declaration of alienage divest himself of British nationality during a time of war and become solely a subject of an enemy State. By English law the defendant's act of naturalization was void and illegal, and he remained a British subject. The possession of British nationality does not, however, exempt anyone from liability under the Treaty of Peace Order; the only material factor for this purpose is whether a person is by German law a German subject, whatever other nationality he may possess.

In *Fasbender* v. *Attorney-General* a similar question arose, and Russell, J., followed the decision of P. O. Lawrence, J. The primary ground of the former's judgment, however, involves a deeper consideration of the earlier cases. The facts in this summons were that the plaintiff, after the signing of the Treaty of Peace, but before January 10, 1920 (when it came into force), being then a British subject, went to Germany

and married a German subject. At all material times the plaintiff was the registered holder of certain fully-paid shares in an English company. The Public Trustee, as custodian of enemy property, claimed these shares, on the ground that by her marriage the plaintiff had become a German national, and that on January 10, 1920, her property had become charged under the Treaty of Peace Order.

This claim was upheld by Russell, J., on the ground that the principle of *R.* v. *Lynch* and *Ex parte Freyberger*, though applying to sections 13 and 14, does not apply to section 10 of the British Nationality and Status of Aliens Act, 1914; and that the plaintiff was not merely a German national under the Treaty of Peace Order, but by her marriage became a German subject according to English law. This decision, therefore, involved a decision that the marriage was valid, and invites further consideration of the earlier cases.

Three grounds appear to have been expressed for the decision in *R.* v. *Lynch*, namely: (1) Section 6 of the old Act (similar to section 13 of the Act of 1914) did not alter the common law by permitting a person to exchange British for enemy nationality, as it contained no explicit statement to that effect. (2) The act of naturalization was an act of treason, therefore no rights could result therefrom. (3) (by Channell, J.), section 6 was not an empowering section, but dealt only with the results of valid naturalization; therefore it did not alter the common law on the subject. In *Ex parte Freyberger* the first of these grounds appears to have been the *ratio decidendi* (apart from the Military Service Act). The act was not alleged to be treasonable, though nugatory; and section 14 appears to be of an empowering character. Therefore, even though the applicable section is empowering, and the act is not treasonable, a person is not permitted under such a section to divest himself of British nationality and become possessed solely of enemy nationality.

In view of these considerations there is some difficulty in accepting the differentiation, made by Russell, J., between the effect of sections 13 and 14 and section 10 of the Act, as the basis of the decision. Section 10, as is noted, is, like section 13, not an empowering section; therefore if section 14 does not alter the common law rule as to divesture of British nationality in time of war, section 10 cannot do so. The *ratio decidendi* is therefore not so much that the effect of section 10 is different from that of sections 13 and 14, as that the marriage was by common law, and therefore now, valid. This was stated by Russell, J., but he gave no reasons. Marriage with an enemy, though it may have been an act that gave comfort to one of the King's enemies was not only not a treasonable act, but not even an invalid one. To arrive at this decision one of two premises must be accepted—

(1) The marriage was not treasonable, because the effect was not to help the King's enemies, as such, but only in a private capacity.

(2) The common law does not invalidate an exchange of British for enemy nationality, provided that such alienage is not the primary object of an act, though it must result therefrom.

This would appear to lead to some modification of the meaning of *mens rea*.

B. F. M.

CORPORATIONS AND NATIONALITY—DOCTRINE OF *in fraudem legis*—ROMAN-DUTCH LAW.

Dadoo, Lim. and others v. *Municipal Council of Krugersdorp.*

BY the law of the Transvaal, an Asiatic is prohibited from owning immovable property in that Province. What then shall be said if an Indian turn himself into a company and purchase "stands" or town-plots in the company's name? The question came before the Supreme Court of South Africa in the above-named case.

Of the 150 shares in Dadoo, Lim., 149 were owned by Dadoo, and the other share by Dindar, both of whom were admittedly Asiatics. In May, 1915, Dadoo, Lim., took transfer of certain stands in the township of Krugersdorp. Yet both by the Gold Law and by a condition embodied in the title to the stands, Asiatics were prohibited from owning them. Consequently, the municipality brought an action to have the transfer set aside, under the rule of Roman-Dutch Law by which a third party intended to benefit under a contract may enforce the contract by action. (Their *locus standi* was, however, contested, the point being left undecided.)

In the court of first instance, Wessels, J., held that the transfer was *in fraudem legis*, since the intention of the Legislature was to prohibit Asiatics from obtaining *control* of land. On appeal, however, the Appellate Division of the Supreme Court held by a majority (Innes, C.J., and Solomon, J.A., de Villiers, J.A., dissenting) that the transfer could not be set aside.

The argument turned upon the operation of the doctrine of *in fraudem legis*, based on texts in the Corpus Juris, notably D.1.3.29 and 1.3.30:—"Contra legem facit qui id facit quod lex prohibet, in fraudem vero qui salvis verbis legis, sententiam ejus circumvenit. Fraus enim legi fit ubi, quod fieri noluit, fieri autem non vetuit, id fit: et quod distat dictum a sententia, hoc distat fraus ab eo quod contra legem fit." These maxims seem sufficiently wide; but after considering their application, both in the Digest and in the civilians, and particularly their application to the SC. Macedonianum (forbidding loans to a filiusfamilias), the Court held that the doctrine was not in fact more extensive than the corresponding doctrine of English law; and was aimed not at transactions which successfully kept outside the law, but at those which, while really coming within it, were so disguised as to appear to be outside it. The intention of the Legislature must be gathered from the words of the statute. Since then the law forbade the *ownership* of land by Asiatics, and since Dadoo, Lim., a juristic person, was clearly not an Asiatic, the ownership of stands by Dadoo, Lim., was not contrary to law. (The statute has since been amended.) *Salomon* v. *Salomon & Co.* [1897] A. C. was cited; the *Daimler Case* [1916] A. C. was distinguished, rather cursorily it is submitted, and described as "a very special case."

De Villiers, J.A., in a dissenting judgment, held, with Wessels, J., in the Court below, that the transaction violated the *sententia* or *mens legis*, and was therefore *in fraudem legis;* and he added the interesting suggestion that the formation of the company itself was unlawful, since it was not an association "for a lawful purpose" as required by the Companies Act (Act 31 of 1909).

The point was apparently not directly taken, that, though the company itself could not be said to be of any race or nation, the fact of its being

controlled by Asiatics invested it, for some purposes, with their nationality. Yet the analogy to the *Daimler Case* is obvious. The case is an excellent illustration of the difficulties which must arise whenever doctrines based upon human characteristics have to be applied to juristic persons. One is reminded of the chapter in American law dealing with the State-citizenship of incorporated banks; a chapter opening with the judgment of Marshall, C.J., in *Bank of U. S.* v. *Deveaux* (1809) 9 U. S., and closing apparently with the *St. Louis Railway Case,* 161 U. S. 545, whereby it was conclusively presumed, *not* that an incorporated bank is a citizen of the State where it is registered, but that all the "corporators" of such a bank are *ipso facto* citizens of that State! It is submitted that the law should not blind itself to facts without very good cause; and that in certain classes of case a too rigid enforcement of what Maitland calls the "Fiction Theory" of corporations is fraught with undesirable consequences to the living and flexible body of the law. As de Villiers, J.A., remarked in this case, "No doubt the corporation is a distinct *persona*; but it does not follow that in a matter such as this the Court is necessarily debarred from looking at the character of the individual shareholders."

J. C. M.

CONTRACT—ENEMY. CHARACTER OF CORPORATIONS—WAR—DISSOLUTION AND SUSPENSION OF CONTRACTS.

In re Badische Co.; Bayer Co., &c. [1921] 2 Ch. 331.

THIS consolidated group of actions arising out of pre-war contracts for German dye-stuffs illustrates the importance of at least three principles of the Law of Contract. The issue was to decide whether claims arising out of the non-fulfilment of these contracts should be admitted as debts due from the companies, which were being wound up as enemy concerns under controllers. Did the outbreak of war dissolve the contracts, either by reason of the enemy character of the companies, or failing that, for the reason that continued performance involved intercourse across the line of war, or for any other reason? The case occupies many pages of the reports and the actual facts are involved, but it will be sufficient to note three principles of law discussed therein.

1. The effect of the outbreak of war as regards the dissolution of a contract with a company controlled by enemy aliens.

2. The effect of a suspensory clause in the event of "war."

3. The principle of frustration of adventure.

1. As regards the first point, Russell, J., discussed the scope of the Daimler Case (*Daimler Co.* v. *Continental Tyre and Rubber Co.* [1916] 2 A. C. 307). This, very briefly, decided that, while a company registered and carrying on business in England is *not* an alien enemy (even though all the shareholders and directors are of enemy nationality, and resident in enemy territory), yet such a company cannot maintain an action through its secretary, if he has no authority to sue, and can only obtain such authority by intercourse across the line of war with his enemy directors. In the case before the Court it appeared that the vendor company was

such a company as specified in the *Daimler Case*. Accordingly all contracts to which it was a party were dissolved *eo instanti* the outbreak of war within the principle of *Esposito* v. *Bowden* (1857) 7 E. & B. 763. That the company should *eo instanti* the outbreak of war have assumed an enemy character explains the scope of the *Daimler Case*. It was possible for the company to divest itself of enemy character and lawfully carry on business here. But on August 4, 1914, the control of the company was in the hands and power of persons resident in, and nationals of, Germany, and the company therefore assumed enemy character despite the extreme improbability of active German interference.

2. But, even assuming it to be doubtful that the company acquired enemy character on the outbreak of war, there remained the fact that further performance of the contract involved intercourse with the enemy, or that its continued existence would confer upon the enemy an immediate or future benefit. The contract contained a suspensory clause, operating in the event of various risks, including "war." Allowing that "war" included a war between England and Germany, which it was unnecessary to decide, the whole contract was void within the doctrine of public policy (*Ertel Bieber & Co.* v. *Rio Tinto Co.* [1918] A. C. 260). Suppose that both contracting parties had been British subjects, but the vendor could only perform his obligations by obtaining deliveries from Germany, the operation of a suspensory clause would be overreached by the paramount necessity of preventing intercourse across the line of war, apparently both at the moment and after the war. For the continued existence of the contract would be an indirect asset to the enemy, during and after hostilities. Therefore the contract became void *in toto* on outbreak of war. (See also *Veithardt and Hall* v. *Rylands Bros.*, 86 L. J. Ch. 604.)

3. As to frustration of adventure, it is suggested that there is a difference between avoidance of a contract under this doctrine, and under illegality. For frustration depends upon an implied term in the contract, whereas illegality does not, and indeed cannot. Waiving again the illegality point, did the circumstance of outbreak of war between England and Germany constitute such frustration as would amount to supervening impossibility, excusing performance of the contract? The doctrine lies in the presumed intention of the parties. Performance of this particular contract was to be spread over a period of one year. The impossibility of performance in view of the subsequent Treaty of Peace would extend to more than fifteen years. This was a clear case of frustration of adventure, under which dissolution of the contract operates automatically and does not rest on the choice of one of the parties. A further point was raised as to whether frustration could apply to contracts for unascertained goods. There appears no reason why it should not, where trading with the enemy or administrative intervention is involved, and where special facts exist (*Blackburn Bobbin Co.* v. *Allen and Sons* [1918] 1 K. B., at p. 550). It is to be noted that this doctrine has been widely extended since 1914, and is no longer confined to purely commercial frustration (*Horlock* v. *Beal* [1916] 1 A. C. 486; *Tamplin* v. *Anglo-Mexican Co.* [1916] 2 A. C. 397).

E. C. S. W.

CONTRACT—COVENANT IN RESTRAINT OF TRADE.

Fitch v. *Dewes.* [1921] 2 A. C. 158.

ACTION brought by a solicitor practising at Tamworth to restrain appellant from practising as a solicitor in breach of an agreement of service between respondent and appellant.

Fitch agreed with Dewes that he would not practise alone or with any other persons as a solicitor within a seven-mile radius from the Town Hall at Tamworth. The breach of the agreement was admitted and the sole question for determination was whether in the circumstances of the case the agreement was unenforceable by reason of its being in unreasonable restraint of trade.

In *Morris* v. *Saxelby* [1916] 1 A. C. 688, it was decided that an agreement made between an employer and employee, the employee covenanting not at any time during a period of seven years from leaving the employment to carry on directly or indirectly either in the United Kingdom of Great Britain or Ireland the sale or manufacture of certain specified articles, the manufacture of which constituted the business of the employer, *was void.* Lord Atkinson said, "This agreement is not, having regard to all the circumstances in the case, reasonable in reference to the respective interests of the parties concerned, and is prejudicial to the interests of the public."

The cases, *Attwood* v. *Lamont* [1920] 3 K. B. 571, and *Bowler and Blake* v. *Lovegrove* (reported in [1921] 1 Ch. 642)) should also be noted. In the former (a case of a tailor's cutter), as regards the reasonableness of a covenant, it was said that the burden of proof as to reasonableness lies on the party benefiting; a master is not entitled to protect himself from the competition *per se* of a former servant; nor can the servant be prevented from using his own skill and knowledge, which he may to a very large extent have obtained during the course of his employment. In the latter case (that of an auctioneer's clerk) it is clear that, if there is any real fear that the servant can injure the late master by misuse of his acquaintance with customers, or his knowledge of trade secrets, or that the master's trade connexion would be unduly invaded by reason of any special opportunities the servant might have acquired while in his employment, a covenant so restricting him will not be deemed unreasonable.

In view of the decided cases quoted above, it is quite clear on what principle cases dealing with restraint of trade should be dealt with. The decision, therefore, in *Fitch* v. *Dewes* is on all fours with the other decisions, namely, that if the opportunities given to the servant have been of an unusually intimate kind and have enabled him to get close personal contact with his master's clients, then a covenant which in a less confidential class of occupation would be unreasonable may be reasonable. In *Fitch* v. *Dewes* the servant's opportunities were of an exceptional kind. In point of fact he had in one year interviewed more than 50 per cent. of the clients. Lord Birkenhead, L.C., in his judgment said: "Indeed, I am of opinion that it is in the public interest that a proper restrictive agreement of this kind between an established solicitor, possibly an elderly man, and a younger man should be allowed. It is in the public interest because otherwise solicitors carrying on their business without a partner would be extremely chary of admitting competent young men to

their offices. There is, therefore, nothing in the clause which I have read which conflicts with public interest, unless it exceeds what is necessary for the protection of the covenantee, in which case the excess itself would be against public interest." The learned lord then pointed out that it is quite consistent with public policy to make such a covenant (restricted to a small area in space—only a radius of seven miles) unlimited in respect of *time*.

The conclusions to be drawn from the cases quoted are these:—

(1) It is unreasonable to restrict a person's competition *per se*. Such skill acquired during apprenticeship is obviously intended by the very nature of such apprenticeship to be used to the fullest advantage. Special trade secrets are, of course, an exception to this rule. (*Morris* v. *Saxelby*.)

(2) The burden of proving the reasonableness of the covenant lies on the party benefiting by the covenant; the covenant must be reasonable, not merely from the point of view of both the parties, but also of the general public. (*Attwood* v. *Lamont*.)

(3) If there is any real fear that the servant will, or can, injure his late master by misuse of his acquaintance with his customers, or of his knowledge of trade secrets, or that the master's trade connexion would be unduly invaded by reason of any special opportunities the servant might have acquired while in his employment, a covenant so restricting him will not be deemed unreasonable. (*Bowler and Blake* v. *Lovegrove*.)

(4) A covenant which is reasonably limited in its operative sphere as regards space, and yet unlimited in time, and which is of such a nature that the restraint is only on the use of what may be called *personal* and *confidential* advantages, is not in restraint of trade. (*Fitch* v. *Dewes*.)

H. M. A.

Contract—Fire Insurance—True Answer.

Condogianis v. *Guardian Assurance Co., Lim.* [1921] 37 T. L. R. 685.

This was a claim for a declaration that under a policy of insurance of the defendant company, dated March 1, 1918, that company was liable to pay to the plaintiff the loss sustained in consequence of a fire which occurred on April 17 of that year, and by which a large part of the property insured was destroyed.

On appeal to the Judicial Committee of the Privy Council the respondents relied on several defences. The defence on which the case turned was that among the questions in the fire insurance proposal under consideration there was the following:—"Has proponent ever been a claimant on a Fire Insurance Company in respect of the property now proposed, or any other property? If so, state when, and name of company."

To this the answer was given: "Yes, 1917. Ocean." This was literally true, *i.e.*, it was true that the proposer had in the year 1917 made a claim against the Ocean Company in respect of the burning of a motor car. He omitted, however, to state what was also the fact, namely, that in the

year 1912 he had made another claim against the Liverpool and London and Globe Company in respect of the burning of a motor car owned by him, and in respect of which claim he received £267 3s. in settlement.

There was an express declaration, in the present proposal, that "any questions remaining unanswered will be deemed to be replied to in the negative."

It was stated by Lord Shaw that the principle of a fair and reasonable construction of the question and answer must be applied. And "if on such construction the answer is not true, although upon extreme literalism it may be correct, then the contract is avoided." Their Lordships found no difficulty in maintaining that the question demanded in its answer the record of the insured with regard to insurance claims, and not a declaration of one only of several insurance claims. They held, therefore, that the answer in question was not a true answer, and on this ground dismissed the appeal.

N. A. C.

Gaming—Cheque Given for Racing Bet.

Briggs v. *Sutters.* [1922] A. C. 1.

This case was taken to the House of Lords by bookmakers in an attempt to overrule the decision of the courts below in the former case of *Dey* v. *Mayo;* but in view of the point of law which arose and was decided in the latter only one decision was possible. This turns on the Gaming Act of 1835, the effect of which is shortly as follows.

Section 1 makes bills, notes, etc., given as security for money lost in wagers on sports and pastimes (*e.g.*, horse racing) void as between the original payee or drawee and the maker or drawer. This does not affect its validity in the hands of a holder in due course. Section 2, therefore, provides that if the drawer of a bill pays any "indorsee, holder or assignee," he shall be entitled to recover the amount so paid from the person to whom the bill was originally given. For example:—

A. backs an unfortunate horse with bookmaker B. He pays his loss by cheque. If B. sues on the cheque, A. is protected by section 1. If B. endorses the cheque to C. and A. pays C. without enquiring whether C. is a holder in due course or not, A. can recover the money so paid from B. by virtue of section 2.

There is nothing illogical in this; the real force of the decision lies not in the ruling of the House of Lords that a statute means what it says, but in the fact that it has finally decided that if B. pays the cheque into his bank to the credit of his account, the banker is an "indorsee or holder," and if A. meets the cheque, he has paid to an "indorsee or holder" within section 2 and is entitled to recover from B.

It was argued that the banker was merely an agent for collection and not an "indorsee or holder" within the section, and emphasis was laid on the crossing of the cheque in this case—"Not negotiable. Payee's account only." The Lord Chancellor pointed out that a holder is none the less a holder because he holds as agent for another, and restrictive crossing makes no difference once the meaning of "holder" is made so wide.

Whether this decision imposes upon executors and trustees in bankruptcy a duty to increase the estates for which they are responsible by recovering all moneys paid thereout in this manner to the limit allowed by the Statutes of Limitations, is not yet settled.

R. M. H.

NATURAL AND PROBABLE CONSEQUENCES—REMOTENESS OF DAMAGE—CHARTERPARTY—DESTRUCTION OF SHIP BY FIRE—NEGLIGENCE OF CHARTERERS' SERVANTS IN UNLOADING.

Polemis v. *Furness Withy & Co., Lim.* (152 L. J. 56; 37 T. L. R. 940.)

THE appellants chartered a steamer from the respondents, the owners. The charter provided, *inter alia*, that the charterers should at the end of the charter redeliver the vessel in good condition "unless lost," also that loss or damage by fire on board was mutually excepted.

The cargo consisted partly of benzine or petrol for Morocco, and upon arrival was discharged by Arabs employed by the charterers or their agents. The Arabs were the charterers' servants. While unloading, the Arabs negligently dislodged a plank from a staging which had been temporarily erected for the purpose of facilitating the moving of the cargo and such plank fell into the hold, causing a spark, which ignited petrol vapour in the hold. The spark was followed by a rush of flame which resulted in the total destruction of the ship.

The Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.). affirming the decision of Sankey, J., held:

(1) That even admitting the causing of the spark could not reasonably have been anticipated from the falling of the plank, yet the harm was not too remote.

(2) That the words "unless lost," together with the exception as to harm by fire, did not denote destruction by fire caused through the negligence of the charterers' servants, and consequently the charterers were liable to the owners.

It was argued on behalf of the charterers that damages for the loss of the ship could not be recovered, as the causing of the spark was something which could by no possibility have been foreseen and which no reasonable person would have anticipated and therefore the destruction of the ship was not the natural and probable consequence of the negligent act and the damage or harm was too remote.

The appellants' counsel also endeavoured to maintain a distinction between the anticipation of the extent of the harm resulting from a negligent act and the anticipation of the type of damage or harm resulting from such act. He admitted that a person whose negligent act has caused harm could not say that he could not reasonably foresee the extent of the harm, but he contended that the negligent person was entitled to rely upon the fact that he could not have reasonably anticipated the type of harm which resulted from his negligence.

This raises the question whether a person guilty of negligence is responsible in respect of something which no reasonable person would have anticipated.

In *Rigby* v. *Hewitt* (1850) 5 Ex. 240, Pollock, C.B., said: "I am, however, disposed not quite to acquiesce to the full extent in the proposition that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct."

In *Greenland* v. *Chaplin* (1855) 5 Ex. 243, he said: "I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated."

A contrary view was taken by Channell, B., and Blackburn, J., in *Smith* v. *London and South Western Railway Co.*, L. R. 6 C. P. 21. Channell, B., said: "When there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

Blackburn, J., said: "What the defendants might reasonably anticipate is only material with reference to the question whether the defendants were negligent or not and cannot alter their liability if they were guilty of negligence."

The view taken by Pollock, C.B., and that taken by Channell, B., and Blackburn, J., may be summed up respectively as follows: According to the former the defendant is responsible only for the consequences resulting from the act, assuming it to be negligent, which may reasonably be expected to result from such negligence. According to the latter the consequences which may reasonably be expected to result from a particular act are material only in reference to the question *whether the act is or is not a negligent act.* Once negligence is established the defendant is responsible for all damage which results directly from the act.

The latter is the view which has now obtained judicial recognition. It was adopted by Sir Samuel Evans in *H.M.S. London* [1914] P. 72, 76, and by Lord Sumner in *Weld-Blundell* v. *Stephen* [1920] A. C. 983, 984, and it was also adopted by all three of the Lords Justices in the case under consideration, Lord Justice Warrington expressly stating that in his opinion the law on the point was correctly stated in the late Mr. Beven's book on *Negligence*, in which the same view is adopted.

R. B.

TORT—CONVERSION.

Murdoch & Co. v. *Wood.* [1921] W. N. 299; 38 T. L. R. 23.

APPEAL from Marylebone County Court. On November 8, 1919, the plaintiffs and one Cohen entered into a hire-purchase agreement by which Cohen hired a piano. By the terms of the agreement the property in the

piano was not to pass to Cohen until all the instalments had been paid. Also Cohen was to keep the piano in his own custody, and "if the hirer do not duly observe this agreement, the owner may, without any formal notice, put an end to the hiring and retake possession." In June, 1920, the piano was sold by Cohen to the defendant, who believed that it was Cohen's property. At that time no instalments were in arrear.

In October, 1920, Cohen borrowed the piano, which was delivered at his house. Subsequently Cohen informed the defendant that he only had the piano on a hire-purchase agreement. Thereupon the defendant refused to have any more dealings with it and Cohen promised to pay back to him the purchase money of £55.

Cohen sold the piano to somebody else and in December, 1920, left England without paying the defendant. All the instalments due up to then had been paid by Cohen, but a balance of £12 remained due. The plaintiffs did not know of the above dealings until December, 1920.

They claimed damages against the defendant for the conversion of the piano and they got judgment in the County Court for £55. The defendant appealed and the Court allowed the appeal.

Horridge, J., in delivering the judgment of the Court, said that if the plaintiffs were entitled to possession of the piano when the defendant took it over in June, then undoubtedly the acts of the defendant amounted to conversion. It was contended that Cohen repudiated the contract by his wrongful act in selling the piano. "But one party could not effectually repudiate without an acceptance of the repudiation by the other party—[*Johnstone* v. *Milling* (1861) 16 Q. B. D. 460]—and the plaintiffs, being unaware of the transaction, never accepted the alleged repudiation."

In *Whiteley, Lim.* v. *Hilt* [1918] 2 K. B. 808, the Court of Appeal, reversing the judgment of the Divisional Court, had held that a sale by the hirer did not amount to a repudiation. Also, in this case, Cohen continued to pay instalments as late as December, 1920. Therefore, there could not have been any repudiation determining the rights of the hirer.

Owing to the breach of the agreement by Cohen the plaintiffs were entitled to put an end to the hiring and retake possession. They did neither owing to ignorance of the transaction. Consequently they were never in the position of being entitled to retake possession of the piano. Until the hirer's interest determined trover would not lie. (*Gordon* v. *Harper* (1796)). Consequently, as Cohen's interest still existed, there was no conversion by the defendant and the appeal must be allowed.

H. C. W. T.

[Editor's Note.—

It is difficult at first sight to understand why the purchase by the defendant from Cohen did not constitute conversion in the defendant. The Divisional Court did not apparently consider the point that it was a breach of the hire-purchase agreement for Cohen to let the piano go out of his possession. It is apparent from the decision of the Court of Appeal in *Whiteley, Lim.* v. *Hilt* (*supra*) that there was no conversion on the facts of that case, which are not precisely the same; for it did not necessarily follow there that the sale of a chattel hired by a hirer conveyed no title whatever. *Murdoch* v. *Wood* has been reversed on appeal, the Court of Appeal holding that a Divisional Court has no jurisdiction to reverse a decision of the County Court upon grounds which were not raised before the County Court Judge (38 T. L. R. 393). The Master of the Rolls considered it right to say that the case ought not to be cited as

an authority in any subsequent case. He expressly reserved the question as to whether the decision of the Divisional Court was right or wrong.

E. C. S. W.]

TORT—CONVERSION—NATURE OF INFRINGEMENT.

Van Oppem & Co., Lim. v. *Tredegars, Lim.* 37 T. L. R. 504.

The plaintiffs as carriers mistakenly delivered certain goods to M. While the goods were in M.'s warehouse, B., the agent of the defendants, saw them, claimed them as the property of his principals and purported to sell them to M., who paid the defendants for them. [It does not appear that the defendants were consignors of the goods, or that the claim of their agent thereto was a rightful one.]

Plaintiffs sued for conversion, claiming full value of the goods.

It was argued for the defendants, on what amounted to a demurrer, that the facts did not disclose anything to support a cause of action, inasmuch as (1) the plaintiffs as bailees had parted with possession by their delivery to M., and could not therefore maintain trover. (2) The defendants had not in any way physically interfered with the goods or with the documents of title thereto; and in the absence of such physical interference, conversion could not be maintained.

Darling, J., gave judgment for the plaintiffs. He held that even if the plaintiffs could not sue in trover, they had a good cause of action on the case, and since the Judicature Acts this could make no difference. As to (1), although by virtue of the mistaken delivery M. had physical custody of the goods, constructive possession remained in the plaintiffs. M. held the goods merely as their agent. As to (2), actual physical interference with the goods is not essential to conversion. The act of the defendants in purporting to sell the goods was an infringement of the plaintiffs' rights sufficient to constitute conversion.

The nature of the "infringement" in this case consisted of a *wrongful disposal* of goods without any *taking possession* of them. The decision thus goes further than that in *Hiort* v. *Bott*, L. R. 9 Ex. 86, where there was at least an interference with the document of title.

It would appear that in developing a test of conversion, the Courts show an increasing tendency to look to the result of the act of a defendant on the title of a plaintiff, rather than to the nature of the act of the defendant.

A wrongful act whereby a plaintiff, being entitled to the possession of goods, is deprived of that right suffices to constitute conversion.

H. E. S.

NEGLIGENCE—MASTER AND SERVANT—DEFECTIVE APPARATUS SUPPLIED BY MASTER—EFFECT OF KNOWLEDGE ON PART OF MASTER OR OF SERVANT.

Baker v. *James Bros.* [1921] 2 K. B. 675; 37 T. L. R. 591

THIS case is of importance from the disapproval expressed by McCardie, J., of *Griffiths* v. *London and St. Katherine's Dock Co.*, 13 Q. B. D. 259, a case which, though undoubtedly anomalous and con-

flicting with established principles, has often been cited as an authority. That case decided that in an action for negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege, not only that the master knew, but that the servant was ignorant of the danger.

In the present case the plaintiff, a commercial traveller, was supplied by the defendants, his employers, with a motor car to be used in his work. The starting gear of the car was defective; after repeated complaints on the part of the plaintiff, the defendants directed him to use the car for one more round, after which they would get it repaired. The plaintiff did so, and was seriously injured in trying to re-start the car after it had stopped dead while he was driving it. He sued his employers for personal injury to himself arising from their negligence.

Held—(1) That a servant need not aver actual knowledge of the defect on the part of his master—it suffices that the master ought to have known of it.

(2) That the fact that the servant knew of the danger, though it may be evidence of implied consent or of contributory negligence, is not conclusive that he voluntarily undertook the risk.

In this case, since there was neither implied consent nor contributory negligence, the plaintiff was entitled to recover substantial damages.

R. R. A. W.

Combination to Secure Trade Interests—Intimidation—Conspiracy.

Ware and De Freville v. *The Motor Trades Association and Others.*
[1921] 3 K. B. 40; 90 L. J. K. B. 949.

This is an important case, simple enough in itself, but made difficult of understanding by the citation of numerous decisions the relevancy of which it is permissible to doubt, and in which, as Sir Frederick Pollock says (L. Q. R. xxxvii, 395), the continued bandying of "such question-begging epithets as 'Conspiracy,' 'Intimidation,' 'Threats,'" tends to confuse the issue.

The plaintiffs were dealers in motor cars. In transacting business with a customer they infringed the rules of the defendant association—a trade union of motor car manufacturers—relating to the price of a car. In the result the defendants notified the plaintiffs that they must, *inter alia*, pay £50 to a charity and undertake to prevent such occurrences in the future, or their name would be entered in a "Stop-list." The object of these lists was to fix the price of goods; and persons named in such lists were prevented from obtaining, directly or indirectly, protected articles. Plaintiffs issued a writ for an injunction. Defendants thereupon put plaintiffs on the "Stop-list." The plaintiffs succeeded in the Court below, but on appeal this decision was reversed.

Held—The defendants acted *bonâ fide* in the protection of their trade interests, and in these circumstances neither such threats as were used nor the acting in combination rendered their conduct unlawful or actionable.

Scrutton, L.J., and Atkin, L.J., though not expressing a final decision, held further that, in view of section 4 of the Trades Disputes Act, 1906,

which says the Courts shall entertain no action for damages against a trade union for any tortious act, no injunction against a threatened tortious act of a trade union can be granted.

Plaintiffs' claim was based on: (1) Unlawful conspiracy to injure, and (2) Unlawful threat to place their name in the "Stop-list." There was not sufficient evidence to establish (1).

On the combination element in this case reference was made to the recent decisions of Mr. Justice McCardie in *Pratt* v. *The British Medical Association* [1919] 1 K. B. 244, and Mr. Justice Astbury in *Valentine* v. *Hyde* [1919] 2 Ch. 129, on the one hand, and to that of Mr. Justice Peterson in *Hodges* v. *Webb* [1920] 2 Ch. 170. This latter judgment was strongly approved.

The Court was bound by *Quinn* v. *Leathem* [1901] A. C. 495, which decided that "while combinations to secure the interests of the confederates in their trade by reasonable and legitimate means are not actionable, combinations which exceed this limit and cause damage by action intended to injure, are actionable."

Scrutton, L.J., therefore put the matter thus: "Is a combination intended to secure that new goods be sold at fixed prices . . . by refusing to supply persons who sell at other than the fixed prices, (2) to inform confederates . . . by means of a 'Stop-list,' (3) to take steps to ensure that the person . . . not to be supplied directly is not supplied indirectly, a reasonable and legitimate means of protecting trade interests?"

The answer is yes; and as far as reasonableness goes the Courts will not review the discretion of the parties in every case so long as the means employed are of a possibly reasonable kind.

"This combination seems at least as unobjectionable as that in the *Mogul Case* [1892] A. C. 25, which was intended to drive a shipowner out of the trade." And a point of importance is emphasized by Atkin, L.J.: "There is no . . . proof, no evidence that the defendants . . . had any intention to injure the plaintiffs." Atkin, L.J., said: "It appears to me beyond dispute that the effect of the two decisions in *Allen* v. *Flood* [1898] A. C. 1, and *Quinn* v. *Leathem* (*supra*) is this, that on the one hand a lawful act done by one does not become unlawful if done with the intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done with the intent to injure the other."

Some of the principles applicable to these cases are quite settled, but when we get collective action we have to distinguish between cases in which there is an "intent to injure" and in which there is merely an intent to protect and further trade interests even though this does injure. The distinction is a difficult one.

The decisions which attempt to solve this question conflict. The state of the authorities is unsatisfactory and, as Scrutton, L.J., said: "The House of Lords should make clear the effect of its various decisions."

A. E. R.

SLANDER—WHETHER ACTIONABLE *per se*.

Mycroft v. *Sleight*. 37 L. T. R. 646.

The skippers and crews of certain trawlers were on strike, and at a meeting of members of the trade union the defendant, one of the officials,

accused the plaintiff, a skipper, of going to his employers and asking for a ship.

McCardie, J., held that the words were defamatory, since they amounted to a charge of trickery, or of underhand disloyalty, or of hypocrisy, which would be condemned by any just, fair-minded and reasonable citizen.

But the action failed because the words were not spoken about the plaintiff in respect of his trade or profession, since no allegation was made of incompetence in seamanship. They were spoken of him in quite a different capacity, namely, that of a member of a trade union, and dealt with an aspect of his life which was collateral only, and not identical with his calling. The slander was therefore not actionable *per se*, and special damage must be proved by the plaintiff in order to succeed in the action. Furthermore the statement was made by an official of the union at a meeting of the members, to whom he was under a moral duty to reveal such information. The situation was therefore privileged, and proof of malice would be required for the plaintiff to win his case.

M. H.

Criminal Law—Mens Rea.

Stonehouse and Another v. *Masson.* [1921] 2 K. B. 818; 37 T. L. R. 621.

This is a case which, though of some importance as settling a point which had been left doubtful by previous cases, cannot be pressed much beyond the limits of the statutory offence of fortune-telling, except in so far as it illustrates the fact that *mens rea* in relation to a statutory offence may be merely an intention to do something forbidden by the statute, and it may be unnecessary to prove any other specific intent, such as to defraud or deceive. The facts of the case, briefly, are these: The appellants, two women, were convicted by a magistrate under the Vagrancy Act, 1824, s. 4, of professing to tell fortunes with intent to deceive and impose upon two of his Majesty's subjects. They described themselves as spiritualists and claimed to have the gift of second sight. The magistrate found that they did make statements which were not true, intending two women to believe them, and though he thought they honestly believed in their powers, and the contrary was not proved, he convicted them. Against this they appealed.

Amongst the cases cited by their counsel were *Reg.* v. *Entwistle* [1899] 1 Q. B. 846, and *Davis* v. *Curry* [1918] 1 K. B. 109, the latter case being very strongly in their favour, deciding as it did that a magistrate was wrong in refusing to hear evidence of honest belief, for a specific intention to deceive was necessary for the offence. All that the former case decided was that, in order to justify a conviction under the statute, there must be an intent to deceive, but that the intent was implied in the words "pretending or professing," and therefore it was unnecessary that an intent should be specifically alleged in the information (the last clause being all that was really decided).

In the present case the Court held that *Reg.* v. *Entwistle* was right, as far as it went, and that *Davis* v. *Curry* went much too far, and was wrong. The Lord Chief Justice gave judgment against the appellants on the ground that *mens rea* was not necessary to constitute the statutory offence of fortune-telling, for the words in the Act "to deceive and

impose" did not apply to the "professing to tell fortunes," but they qualified the words "using any subtle craft, &c. . . . " [The Act says: ". . . every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive or impose on any of His Majesty's subjects."]

Darling, J., who had been a member of the Court in both the cases mentioned above, admitted he had been wrong in *Davis* v. *Curry*, and said he had "come to the conclusion that the Legislature had decided that fortune-telling . . . was a fraud, and that it was a deception in itself, and that quite independently of the question whether the person who told the fortune believed she could tell fortunes or not." This seems the true ground of the decision, which turned really on nothing more than the interpretation of the words in section 4 of the Vagrancy Act.

R. G. M.

THE LAW OF PROPERTY—ABSENCE OF WORDS OF LIMITATION IN AN EXECUTED TRUST.

In re Bostock's Settlement; Norrish v. *Bostock.* [1921] 2 Ch. 469.

THIS decision of the Court of Appeal is of importance as illustrating the strength of the equitable maxim that "Equity follows the Law" in requiring strict words of limitation for the purpose of conveying equitable interests in land, at all events in completely executed transfers. The limitation under review was contained in a settlement completely executing a trust whereby the equity of redemption in certain freeholds was conveyed to trustees in fee simple to the use of W. and H. for successive life interests, and after the decease of H. "in trust for the child or children" of H. "now born or hereafter to be born who shall attain the age of 21 years, and if more than one *in equal shares as tenants in common*, and if there shall be no such child in trust for *the right heirs* of H." The settlement contained further limitations of leaseholds, pure personalty, and policies of insurance, giving the children absolute interests. There was no doubt but that the settlor's whole intention was to confer absolute interests in the mortgaged freeholds as well. The omission of words conferring a fee simple in the freeholds was held nevertheless to be an insurmountable bar to the children taking any greater interests than life estates. The settlor had used technical words of limitation and the settlement had to stand by them.

This case disposes of the view that, where it is obvious there is to be no resulting trust and that the settlor intended the children to take an absolute interest, the Courts will give effect to that intention: *In re Tringham's Trusts* [1904] 2 Ch. 487. It is to be noted that the document in the case under review was executed; had it been still executory a different result would have been possible: *In re Oliver's Settlement* [1905] 1 Ch. 191. Accordingly the same words of limitation are necessary to convey an equitable estate in fee simple as would have been necessary if the conveyance had been one of the legal fee simple, which but for the mortgage would have been so in this case. The decision is consistent with principle and has disposed of the tendency, illustrated by *Tringham's Case*, to allow the intention of a settlor of equitable freeholds to upset the technical limitations of the deed. *In re Whirton's Settlement* [1894]

1 Ch. 661 is upheld. An equitable limitation by way of trust executed has the same effect as a legal limitation. *In re Bostock* is yet another illustration of the settlor's intention being defeated, and it is a very strong example. But, as Younger, L.J., observed, the principle is too firmly established to be altered, save by a "legislative burial."

E. C. S. W.

CONSTITUTIONAL LAW—"ACT OF STATE"—LIMITS OF ACTION AGAINST KING'S OFFICER—RATIFICATION BY CROWN.

Johnstone v. *Pedlar.* [1921] A. C. 262. [1920] 2 I. R. 450.

PEDLAR was born in Ireland, went when very young to the United States, and was naturalized there in January, 1916. In March, 1916, he was in Glasgow, and in April of that year he took part in the rebellion in Dublin. He was deported, was released in May, 1917, returned to Ireland, and was arrested on May 1, 1918, for illegal drilling, and was imprisoned.

When he was arrested he had with him £124 in cash and a cheque, which were seized by the police. On September 2, 1918, he asked that the cash and cheque should be returned to him, which was refused. On November 15, 1918, he brought an action against the Chief Commissioner of the Metropolitan Police alleging detention and conversion of the cash and cheque and claiming their return and damages. On June 19, 1919, the Chief Secretary for Ireland gave a certificate adopting the seizure as an "act of State."

Pim, J., gave judgment for the defendant, which was upheld by the Divisional Court. The Court of Appeal reversed the judgment by a majority, and the House of Lords unanimously upheld the decision of the Court of Appeal.

The principal defence was "that the defendant was an alien and the said monies and cheque were taken and detained by an Officer of the Crown by the direction of the Crown as an act of State for the defence of the realm." The treasonable acts in Ireland were not alleged.

The point at issue was whether Pedlar was an alien enemy or an alien friend.

By the common law an alien enemy, without a licence from the Crown, has no rights, and cannot obtain redress for any wrong done to him in this country: *Sylvester's Case* (1702), 7 Mod. 150.

Pedlar was a subject of a friendly State. The Crown can give protection to a friendly alien, and while resident in the realm he owes local allegiance: Hale, P. C. 1; 542. If he breaks his allegiance he can be prosecuted for high treason: *De Jager* v. *Att.-Gen. of Natal* [1907] A. C. 326; or he can be deported. But the Crown alone can withdraw its protection. Pedlar had flagrantly violated his allegiance, but the Crown had given no indication that it intended to withdraw his implied licence to reside within the realm. His individual hostility does not make him an alien enemy; he is still the subject of a friendly State and entitled to the privileges of an alien friend.

There is a distinction where the wrong complained of was committed against an alien residing without the realm and against an alien resident in the realm. In the former case *Buron* v. *Denman*, 2 Ex. 167, applies.

It proves that if a wrong is done to an alien resident abroad, and the act causing the wrong is adopted by the Crown as an "act of State," then a municipal Court has no jurisdiction, and the alien's remedy is through his own Government. But with an alien resident it is otherwise. Littleton (section 198) laid down that an alien could bring no action, real or personal. Coke (Co. Litt. 129b) says that, as an alien friend may trade, he must "of necessity be of ability to have personal actions." Before the end of the 16th century a friendly alien could sue in contract or tort the same as a British subject: Dyer, 2b. By section 17 of the Naturalization Act, 1914, an alien may hold real or personal property, but the Act contains no provision as to the right to sue. However, according to both international law and the common law of the realm, an alien while within the realm with the permission of the Sovereign can enforce whatever rights he has just as an ordinary subject: *Porter* v. *Freudenburg* [1915] 1 K. B. 857, 869; including the right to sue the King's officer for a legal wrong.

An "act of State" is not a good defence against a claim by an ordinary subject. The subject must have a remedy; he cannot rely on his Sovereign bringing diplomatic relations against himself to right the wrong: *Walker* v. *Baird* [1892] A. C. 491. As the King can do no wrong, it necessarily follows that he cannot authorize one, so if a wrong is done the officer who does it must be responsible.

Pedlar has the privileges of an ordinary subject. The appeal was dismissed, with costs.

Two of the Lords of Appeal doubted if such a seizure by the police could, in any circumstances, be an "act of State." It would seem that, if owing to the disturbed state of a country special provision is necessary in respect of aliens, the remedy is not arbitrary acts by the police, but legislation.

The question of whether the treasonable acts of the plaintiff affected his status as an alien friend was not decided, as the acts were not alleged in the defence. In the Court of Appeal, however, O'Connor, M.R., dissented from the judgment of the majority, on the ground that the right of a resident alien to protection is contingent on his observing the duty of allegiance while in the realm.

H. B.

Petition of Right—Power to Amend.

Ruffy Arnell and Baumann Aviation Co., Lim. v. *The King.*
38 T. L. R. 210.

A petition of right was brought to recover damages for breach of contract entered into by the suppliants with the War Office in 1916. The contract provided for elementary training in flying of officers who wished to qualify for the Royal Flying Corps. Notice was given by the Crown in June, 1918, cancelling the contract.

When the case came before the Court, the suppliants sought to amend their pleadings (the petition of right) by inserting two letters from the War Office to the suppliants sanctioning an increase of the fee from £75 to £125 per pupil payable to the suppliants.

It was submitted by counsel for the Crown that a petition of right

cannot be amended unless a fresh fiat is obtained; the petition is the suppliant's claim and a new claim cannot be put forward without a new fiat granting permission (*Robertson's Crown Practice*, pp. 390, 391). The Petition of Right Act, 1860, s. 7, did not affect the right of the suppliant but was for the purpose of giving power to the Crown to amend its own pleadings, *e.g.*, to obtain security for costs.

Counsel for the suppliants drew attention to the Preamble of the Petition of Right Act—"whereas it is expedient to amend the law relating to petitions of right to simplify the procedure therein . . . and to assimilate the proceedings as nearly as may be to the course of practice and procedure now in force in Actions and Suits between subject and subject." He also submitted that section 7 of the Act is for the assistance of the suppliant as well as for the Crown and that the question of amendment was entirely within the discretion of the Court.

McCardie, J., held that the Petition of Right Act was clearly brought into being to give subjects a remedy against the Crown, and although there was no direct authority on the matter he had come to the conclusion that section 7 of the Act was sufficiently wide for the Court to permit an amendment, and he had less hesitation in coming to that conclusion as the amendment now sought only went to the question of damages. Had the suppliants sought to put forward an entirely new ground of action he would have refused the application.

T. R.

Interpleader Summons—Crown's Position.

The Mogileff. 38 L. T. R. 71; 279 (C. A.).

This was an appeal from a decision of Hill, J., in the Admiralty Division. The sheriff under a writ of *fi. fa.* seized two ships reputed to be the property of the Russian Volunteer Fleet. The Board of Trade thereupon intervened on the ground that the ships belonged to the Crown and requested the sheriff to withdraw. The sheriff, adopting the usual procedure in cases in which he finds himself in possession of property to which the title is in dispute, interpleaded, but it was held by Hill, J., that the Crown could not be made a party to an interpleader summons. From this decision the judgment creditors now appealed.

The Court dismissed the appeal.

The appellants relied upon *Reid* v. *Stern*, 6 Jur. N. S. 267, and argued that *Candy* v. *Maugham*, 6 Man. & Gr. 710 was not an authority for the contrary proposition and in so far as it decided that the Interpleader Act, 1831 (now replaced by the procedure under Order LVII.) did not apply to the Crown was unwarranted. For the defendants it was argued that the Crown could not be made a party to proceedings in its own Courts save on a petition of right.

This latter was the view upheld by their Lordships, Hill, J.'s statement of the principle involved being expressly approved: "I, however, am of opinion that the rule that no action lies against the Crown at the suit of a subject is part only of the wider principle that the King cannot against his will be made to submit to the jurisdiction of the King's Courts" (cf. *Blackstone, I.*, 7, cited by Brett. L.J., in *The Parlement Belge*, 5 P. D., at p. 206).

Reid v. *Stern* was distinguished by Bankes, L.J., on the ground that in that case the Crown assented to the jurisdiction. This reasoning is a little difficult to follow, as the language of Stuart, V.-C., appears to show clearly that this was not the *ratio decidendi* of his judgment. "If the Crown," he said, "was adversely claiming against the stakeholders . . . they had a right . . . to file a bill of interpleader and to make the Crown a defendant to the bill" (at p. 268). However this may be, it is submitted that that case will henceforth be of little utility. On the other hand, *Candy* v. *Maugham* was expressly approved.

It cannot be said that, in view of the doubt cast on *Reid* v. *Stern* in *Robertson, Proceedings by and against the Crown*, at p. 610, the decision is a surprising one. But the situation created by it is both interesting and unsatisfactory, the unfortunate results of the judgments being fully appreciated by their Lordships. Two questions at once arise: (1) How is the plaintiff to get the substantive issue tried, and (2) how is the sheriff to be protected? Since the sheriff stands or falls with the validity of the writ, he may in such a case render himself liable whatever procedure he may adopt. And the course to be pursued in the interests of the judgment creditors is by no means clear, although the point was expressly left open by the judgments. Bankes, L.J., suggested that an action against the Attorney-General for a declaration might be brought.

The whole case vividly illustrates the pressing need for that revision of procedure against the Crown upon which a learned committee is now deliberating.

E. B.

Public International Law—Prize Court—Detention and Requisition of Enemy Vessels.

The Blonde and Others. (1922) 37 T. L. R. 323.

The case was an appeal from the Prize Court (England) to the Judicial Committee of the Privy Council. It turned upon the Sixth Hague Convention, 1907, especially upon the application of Article II., and will probably be the leading case on that Convention.

The *Blonde*, the *Hercules*, and the *Prosper*, three German ships in British ports on the outbreak of war, were seized, and an order was made by the Prize Court for their detention. Later, they were requisitioned, and the *Blonde* was subsequently lost, owing to stress of weather, while the *Hercules* was torpedoed by a German submarine.

The chief issue was whether this country was bound by the Sixth Hague Convention with respect to German shipping.

These ships were detained in British ports on the outbreak of war, pending notification by Germany before midnight of August 7, that she would observe the Convention. This did not come, and the Convention therefore lapsed between the two countries. But subsequent communications passed between them, and by the end of September, both belligerents had agreed (1) what the Convention meant, and (2) that they would observe it.

This, said Lord Sumner, was the old Convention, and not a new agreement.

For the Crown, it was urged that by Article VI. the Convention only applied if all the belligerents were parties to the Convention; and

Serbia and Montenegro had never ratified it. While not definitely deciding upon the interpretation of this difficult article, Lord Sumner declared that Great Britain had waived the possible right so granted: (1) By the negotiations with Germany, referred to above; (2) By the "Chile Order," which was unnecessary if the Convention did not hold; (3) Days of grace were allowed to Austria; (4) The Crown never asked for condemnation of detained ships during hostilities.

The Procurator-General further declared that the Treaty of Versailles had some bearing on the case.

By Part VIII., Annexe III., section 1 of this Treaty, Germany cedes all ships over 1,600 tons and part of those under 1,600 tons. All three ships came within the latter class. It was decided that the effect of this provision was to transfer property in all German ships over 1,600 tons at once to the Allies. In the case of those under, as it is only part that is to be transferred, the Allies have the right of choice, but no absolute specification has been made. Therefore, property in the three ships is still in the owners.

By Article II. of the Sixth Hague Convention, a belligerent has a right to detain an enemy ship "under an obligation to restore it after the war, without indemnity," and also "he may requisition it on condition of paying an indemnity."

Their Lordships therefore advised that the *Prosper*, and the appraised values of the *Blonde* and the *Hercules* should be released to the Public Trustee as Custodian of Enemy Property, "to be retained by him for a reasonable time, say six months, free of expense to the claimants, in order that the Crown may have an opportunity of commencing proceedings, and in that case further until the final determination of those proceedings, but in any other case to be thereafter forthwith delivered up to the claimants."

It is impossible to refrain from admiration of the ability and legal erudition displayed by Lord Sumner in this intricate case, where the simpler course would undoubtedly have been to condemn the ships.

G. W. K.

REPORTS OF THE UNIVERSITY AND COLLEGE LAW SOCIETIES.

CAMBRIDGE UNIVERSITY LAW SOCIETY.

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Michaelmas Term, 1921.		*Lent Term, 1922.*	
President . .	H. E. SALT (Trinity).	*President* .	R. M. HUGHES (Downing).
Vice-President	R. M. HUGHES (Downing).	*Vice-President*	A. E. RAINBOW (Caius).
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Assistant Treasurer	A. E. RAINBOW (Caius).	*Assistant Treasurer*	A. E. RAINBOW (Caius).

AT a meeting held in the Fellows' Garden of Trinity College at the close of the Easter Term, 1921, H. E. Salt (Trinity) was elected President and Mr. Hollond Treasurer under the new constitution adopted earlier in the Term. Subsequently the Committee elected R. M. Hughes (Downing) Vice-President, R. R. A. Walker (Trinity) Secretary, and A. E. Rainbow (Caius) Assistant Treasurer.

On November 3 a mock trial took place before Mr. A. L. Goodhart, M.A. (Corpus Christi) and a mixed jury. A synopsis of the facts is as follows :—

Rex v. *Robinson.*

Robinson is third officer of the s.s. *Atlantic*, which founders in mid-ocean. Tin-Hat, a Lascar sailor, attempts to rush the boat in which Robinson is seeking to evacuate women and children from the sinking ship. To prevent panic, Robinson takes the drastic action of shooting and killing Tin-Hat. All the remainder of the crew and passengers were saved. On arrival in Liverpool, Robinson is committed for trial on a charge of murder.

For the Crown.—H. E. Salt (Trinity); with him, W. T. Elverston (King's).

For the Defence.—R. M. Hughes (Downing); with him, T. C. Humphreys (Trinity Hall).

The accused was acquitted.

On November 18 the Society had the honour of entertaining Viscount Haldane of Cloan at dinner in Caius College. His address on the Work for the Empire of the Judicial Committee of the Privy Council is printed in this number.

On December 3 the change of officers took place. R. M. Hughes (Downing) was elected President unopposed. The Society debated with the London Law Students' Debating Society the motion, That the law relating to gaming and wagering in England accords neither with good sense nor sound principle. E. C. S. Wade (Caius) proposed the motion and J. B. Ezard (Trinity Hall) spoke third. After an excellent debate, the motion was lost by a single vote.

On February 16 a joint moot was held with the Oxford Moot Club. The following case was heard on appeal before a Bench consisting of Professor Hazeltine, E. A. Morton (Balliol; President Oxford Moot Club), and R. M. Hughes (Downing).

Grocer v. *Hogge.*

Hogge was driving a car negligently along High Street. Bobby Jones, aged five, was playing in the road. Alderman Grocer, walking along the pavement, saw the danger to the child and rushed into the road. He succeeded in saving the child, but was himself injured.

Grocer sued Hogge, but the Judge in the Court below directed the jury that, as the plaintiff had voluntarily exposed himself to the danger, he could not recover. The plaintiff appealed.

For the Appellant.—T. G. J. Binnie (Brasenose); with him, G. H. Lloyd-Jacob (Christ Church).

For the Respondent.—M. E. Holdsworth (Christ's); with him, T. le G. Nel (Clare).

The appeal was allowed, on varying grounds which served to emphasize to the Society the unsatisfactory state of the law of contributory negligence. It is hoped that this meeting will be the forerunner of many similar forensic contests between the law students of these two Universities.

The last meeting of the Term took the form of a dinner at the Lion Hotel on March 2 in honour of Professor Roscoe Pound, Dean of the Law Faculty, Harvard University. Following the dinner there was a concert, including a short address by Professor Pound, who also wound up the evening with tales of his experiences of the administration of justice in the now-vanished cattle country, more familiarly but less accurately known to us as the "Wild West."

R. M. H.

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Assistant Treasurer	J. M. Paine.
Secretary	B. L. Henson.

The Society celebrated its first birthday on January 26 this year. It had two very successful meetings in the Michaelmas Term. On Friday, October 28, Dr. Kenny read a paper on "The Mystery of Elizabeth Canning"; and on December 1 Dr. Carr told the story of the *Aubrey Peerage Case.*

Only one meeting has been held so far in the Lent Term, but an action of slander is down for hearing before the President in the Easter Term's list. The Reverend Marmaduke McGurzlethorpe is claiming damages in respect of a sermon preached by the curate in the parish church. The sermon caused much sensation at the time, and the pending trial promises to arouse great popular interest

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CHRIST'S COLLEGE LAW SOCIETY.

Michaelmas Term.		*Lent Term.*	
President	C. Clayton.	*President*	A. Clarke.
Secretary	A. Clarke.	*Secretary*	J. Cameron.
Committee	M. Holdsworth, F. H. A. Hendry.	*Committee*	B. Morton. G. A. C. Manley,

During the Michaelmas Term seven highly interesting meetings were held, a paper read by the President on the Cambridge Murder Trial being particularly successful.

During the Lent Term eight meetings on Wednesday evenings have been held. On February 15 Mr. H. A. Hollond (Trinity) gave a most interesting address upon the subject of "Causation in the Law of Torts." Before the meeting he was entertained to dinner by the Committee and certain other members.

It is interesting to note that some twenty-four members of the College are reading law, and three-quarters of these have been in regular attendance at our meetings.

CLARE MOOT CLUB.

President	T. le G. Nel.
Secretary	J. W. Booth.

On December 1 the Club met to discuss the following motion: "In view of the present-day revolutionary tendencies, this House considers that it is desirable in the interests of the State that freedom of speech be restricted." *For*, A. G. Coulson and T. le G. Nel; *against*, C. W. G. Guest and H. J. C. Whitmee. The motion was carried by four votes.

On February 2 the Club argued the case of *R.* v. *Robb and Allen*. T. le G. Nel acted as Judge, H. M. Gulland appeared for the Crown, and L. Oldham for the defence. The facts were as follows: Robb and Allen, a couple of tramps, approach Sir William Smyth's house to ask a night's shelter. They find it closed, and Allen hoists Robb through a half-open ventilator, and Robb admits his companion by opening a door. They sleep in the house all night, and next morning they break open a pantry and make free with the provisions which were stored there. They are surprised in the house by Sir William's gamekeeper, and given into custody. The prisoners were acquitted by direction on the charge of burglary, but found guilty of maliciously damaging the door of the pantry.

A Roman Law case was then argued, in which H. A. N. Patterson appeared for the plaintiff and J. D. Finlason for the defendant.

On February 20 a very successful mock trial was held in the College Hall in conjunction with the College Debating Society. Dr. Winfield presided. M. E. Holdsworth (Christ's) and J. W. Booth appeared for the plaintiff, and T. le G. Nel and C. W. G. Guest for the defendant. It was an action for breach of promise to marry.

On February 24 the first annual dinner of the Club was held, the guests being Dr. Winfield, Dr. Wheatcroft, and Mr. Holdsworth.

On March 6 a joint meeting was held with the Queens' Law Society, which is reported in the Queens' report.

EMMANUEL COLLEGE LAW SOCIETY.

President	Prof. H. D. Hazeltine.
Vice-President	H. C. Ferens.
Secretary	K. M. Panjabi.

Members, 17.

On October 26 the President heard and dismissed an appeal from the decision of the County Court Judge, who had held that no cause of action lay against fellow-servants at the suit of a servant whose dismissal was procured by the former, who informed their master that unless plaintiff was dismissed they themselves would leave.

Counsel for Appellant.—E. E. Brett and D. Davies.

Counsel for Respondent.—H. C. Ferens and K. M. Panjabi.

On November 9 the President read a paper on "The Trial and Punishment of Animals."

On November 23 Mr. E. C. S. Wade (Caius) presided over a case dealing with the liability in crime of a wife for acts done in her husband's presence.

Counsel for the Crown.—V. H. Sykes and A. K. Little.

Counsel for the Accused.—P. F. Cammiade and G. D. Khosla.

On January 18 Mr. C. H. Ziegler (Pembroke) read a paper on "The Light Side of the Law."

On February 13 the Gonville and Caius College Law Society entertained the Emmanuel Law Society, when a co-debate was held.

On March 1 Dr. Oliver read a paper on "The Procedure in the Criminal Courts."

On June 3 it is proposed to hold a Society dinner.

K. M. P.

GONVILLE AND CAIUS COLLEGE LAW SOCIETY.

President	E. C. S. Wade.
Secretary	A. E. Rainbow.
Committee . .	H. M. Abrahams, J. H. Reed.

Members, 39.

The first meeting of the year was held on October 24, when Professor Kenny read a most interesting paper on "The *Tichborne Case.*"

On November 10 the Trinity Law Society entertained us in Trinity, when the following motion was debated: "That in the opinion of this House the Criminal Law of Attempts and the punishment thereof is substantially satisfactory."

On November 22 we entertained the Trinity Hall Law Society at a joint moot under the presidency of Dr. Carr (Trinity Hall).

On November 28 Mr. A. B. Cobban (Caius) read a paper entitled "Psychology and the Criminal Law."

The first meeting of the Lent Term took place on January 30, when His Honour Judge Farrant read a most instructive paper on "The Conduct and Procedure of a Criminal Trial."

At the second meeting of the Term the Emmanuel College Law Society was entertained. The following motion was debated: "That in the opinion of this House trial by jury is unessential to the present-day administration of justice." *For*, G. W. Keeton (Caius) and D. W. Murray (Emmanuel); *against*, H. C. Ferens (Emmanuel) and R. H. Finch (Caius).

On February 27 the Trinity College Law Society visited us, and a case was argued before Dr. Winfield (St. John's).

A. E. R.

KING'S COLLEGE LAW SOCIETY.

President . . . . . Rev. T. B. Scrutton.
Secretary . . . . . C. P. Bramble.

In the May Term Lord Justice Bankes gave a most interesting address on "Life and Prospects at the Bar."

In October Mr. W. T. Elverston read a paper to the Society on "The Law and the Poor."

The mock trial—*R.* v. *Smithins and Beddington*—which took place on November 24 and 26 was an unqualified success. It was unique in that all the events leading up to the arrest of the prisoners, and even the magisterial enquiry itself, were previously enacted, so that witnesses gave evidence of what they had actually seen and heard. Dr. P. H. Winfield (St. John's) acted as Judge. The counsel, witnesses, prisoners, and Court attendants were all dressed in accordance with their parts, so that the atmosphere of an actual Court was produced. However, a miscarriage of justice occurred, since both prisoners were acquitted, although according to "The Book of Words" both were guilty.

A joint debate with the Trinity Hall Law Society, arranged for the end of the Michaelmas Term, unfortunately had to be postponed.

PEMBROKE COLLEGE LAW SOCIETY.

Officers:

Michaelmas Term.		*Lent Term.*	
President .	H. I. Nelson, B.A., LL.B.	*President* . . .	R. A. Nisbet.
Vice-President . .	R. A. Nisbet.	*Vice-President* .	F. St. L. Searle.
Secretary . .	F. St. L. Searle.	*Secretary* . .	J. F. P. Maclaren.

Members, 18.

Apart from general business meetings, the following meetings were held:—

On November 17 a railway accident appeal case was heard, questions of liability and damages being at issue.

On the Bench, H. I. Nelson; *for Appellant*, A. T. Young; *for Respondent*, R. M. Simon.

On November 29 the annual mock trial in full dress took place.

On the Bench, Dr. Carr (Trinity Hall); *counsel for prosecution*, R. A. Nisbet and J Maclaren; *for defence*, A. T. Young and F. Searle.

The indictment was for murder, deceased having been shot while masquerading as a ghost. A verdict of "Not guilty" was returned.

On February 7 there was a moot appeal case on the lines of *Jefferson and others* v. *Derbyshire Tanners, Lim.* [1921] 2 K. B. 281 (a recent case of employers' liability for servants in course of employment and fire arising from smoking in a garage).

President of the Court, A. T. Young; *for the Appellant*, F. Searle; *for the Respondent*, R. A. Nisbet.

After a general discussion the appeal was dismissed, *Williams* v. *Jones* not being followed, as special care is required in handling petrol (*Musgrove* v. *Pandelis* [1919]).

A most successful annual dinner was held on February 22, some old members coming up for the occasion.

A. T. Young.

PETERHOUSE LAW SOCIETY.

Michaelmas Term.		*Lent Term.*	
President . . .	E. J. Carthew.	*President* . . .	E. E. Jenkins.
Secretary . . .	E. E. Jenkins.	*Secretary* . . .	H. E. Ricks.
Treasurer . . .	H. E. Ricks.	*Treasurer*	E. Silk.

On November 7 Professor Kenny read a most interesting paper on "The Mystery of Elizabeth Canning."

On February 1 Dr. Carr (Trinity Hall) gave an entertaining account of "The *Aubrey Peerage Case.*"

On February 15 a moot was presided over by Dr. Winfield; it took the form of an Assize Court case, *R.* v. *Prickleheart.* Prickleheart was indicted for murder. The facts were: Goring, by his will, requested that his executor, Prickleheart, should pierce his heart in order to avoid all possibility of premature burial. Prickleheart, believing Goring to be dead, pierced Goring's heart; Goring showed signs of life and then died.

Counsel.—For the Crown, E. J. Carthew and G. H. Taylor; for the defence, H. E. Ricks and R. C. W. Jervois.

Dr. Winfield directed the jury to decide the case on the reasonableness or unreasonableness of the mistake of fact.

The prisoner was acquitted.

On March 1 Mr. A. L. Goodhart, M.A., LL.B. (Corpus Christi) read a paper on "Some American Cases."

H. E. R.

QUEENS' COLLEGE LAW SOCIETY.

Michaelmas Term.		*Lent Term.*	
President . . .	N. A. Carr.	*President* . . .	N. A. Carr.
Secretary . .	F. E. H. Bostock.	*Secretary* . . .	P. A. Wright.

Cases are tried once a fortnight, and during the two past Terms cases based on *R.* v. *Townley*, *R.* v. *Serné and Goldfinch*, *R.* v. *Ashwell*, *Mayor of Bradford* v. *Pickles*, and others, have been discussed. The activities of

the Lent Term were concluded with a joint meeting with Clare College Law Society, at which the following case was tried on appeal. The Court consisted of Holdsworth (Christ's), Nel (Clare), and Carr (Queens').

Counsel.—For appellants, J. W. Booth (Clare); with him, C. W. G. Guest (Clare); *for respondent,* F. E. H. Bostock (Queens'); with him, P. A. Wright (Queens').

The facts were as follows:—

Stetchworth Dairy Co. v. *Husbandman.*

The appellants in this action in tort for deceit claim £100 damages due to them for dairy produce supplied to the respondent. In 1920 the respondent had an account with the appellants, who supplied his household with dairy produce as ordered by his cook. At the end of the year the respondent instructed the appellants that in future everything should be paid for at the door by his cook. He supplied her with the money necessary to make the purchases. A few days later the cook went to the dairy company and said that her master had changed his mind, and that they were to supply dairy produce on the same system as before. They did so, and at the end of the year sent in their bill. Respondent refused to pay, denying liability, since he had given the cook the money to pay at the door, which money she had kept for herself.

Judgment was given in favour of the respondent.

ST. JOHN'S COLLEGE LAW SOCIETY.

President	T. C. Young.
Hon. Vice-President	Dr. P. H. Winfield.
Hon. Secretary	S. G. G. Edgar.
Hon. Treasurer	N. E. Wiggins.
Committee	G. S. McIntire, F. W. Stallard, G. D. Shaw, R. M. Jackson.

Members, 26.

Last Term it was found possible to get in only three meetings, which included a debate, a case set by Dr. Winfield, and a paper by Dr. Rivers on "Melanesian Land Tenure." This Term, at the first meeting, Professor Kenny again visited the Society and read an extremely interesting paper. This was followed at the next meeting by an equally interesting paper from Mr. Hollond on "Exemption from Liability for Remoteness."

On February 24 Dr. Wheatcroft set a case on torts dealing with contributory negligence; T. C. Young, the President, acted as Judge.

The last meeting will be held on March 10, when there will be a debate: "That in the opinion of this House the action for breach of promise of marriage should be abolished."

TRINITY COLLEGE LAW SOCIETY.

Michaelmas Term.		*Lent Term.*	
President . . .	H. E. Salt.	*President* . .	J. C. Macintosh.
Treasurer . .	J. C. Macintosh.	*Treasurer* . .	R. R. A. Walker.
Secretary . .	R. R. A. Walker.	*Secretary* . . .	J. W. Hill.

Members, 28.

The eleventh meeting, on October 13, was devoted to private business.

At the twelfth meeting, on October 27, Professor Kenny read a paper on "The Case of Elizabeth Canning" before an appreciative audience.

The thirteenth meeting, on November 10, consisted of a joint meeting with the Gonville and Caius Law Club, to debate the following question: "That the English Law of Attempts and the punishment thereof is substantially satisfactory." J. P. Phillips (Caius), J. C. Macintosh (Trinity), and H. M. Abrahams (Caius) spoke for the motion; G. S. Hall (Trinity), R. S. Metcalfe (Caius), and R. R. A. Walker (Trinity) opposed. The motion was declared lost by one vote.

At the fourteenth meeting, on November 20, the House of Lords case of "*Locopar* v. *Anson-Tort*" was heard.

Anson-Tort, an undergraduate, having become engaged to Miss Lewison-Lewis, Locopar, his tutor, promised him in writing that from and in consideration of his marriage he would pay him an annuity until his earnings at the Bar amounted to £5. After paying several instalments, Locopar refused to pay any more. Anson-Tort having brought an action, and having succeeded at first instance and in the Court of Appeal, Locopar appeals to the House of Lords.

The Court—Professor Hazeltine, J. C. Macintosh, R. B. Hopkins; *for the appellant*—H. E. Salt and W. M. Williams; *for the respondent*, O. Griffiths and H. G. Meek.

The points at issue were: Was the ability of the original promisor (*a*) by breach and payment of damages, or (*b*) by mutual agreement to avoid the promise to marry, a sufficient consideration to support the subsidiary promise?

Held—No, as to point (*a*); yes, as to point (*b*) (Professor Hazeltine dissenting).

The fifteenth meeting, on January 19, was devoted to private business.

At the sixteenth meeting, on February 2, J. C. Macintosh proposed—"That *R.* v. *Ashwell* was wrongly decided." R. W. Flintoff opposed; H. L. Pettitt spoke third, and J. W. Hill fourth. The motion was declared lost by one vote.

At the seventeenth meeting, on February 23, was held the second annual dinner. The Society entertained Professor Pound, Dean of the Harvard Law School, the Vice-Master, the Master of Trinity Hall, and Professor Hazeltine to dinner in the smaller Junior Combination Room. Professor Pound replied to the toast of "The Guests" in singularly felicitous fashion.

The eighteenth meeting was held jointly with the Caius Law Club in Caius. The case of *Trinhall* v. *The Master and Fellows of Caius College et al.* was heard before Dr. Winfield, sitting without a jury. J. C. Macintosh and A. P. Rose (Trinity) appeared for the plaintiff; G. P. Cammiade, H. M. Abrahams, and N. Thayer (Caius) for the defendants.

Colonel Dugout, wishing to present a captured German gun to Caius, obtained one from the Secretary of State for War, who personally inspected it. The gun having been placed in a Court of Caius, a kitchen boy playing on it discovered a Mills bomb in a concealed part of the carriage. The bomb exploded and injured Mr. Trinhall, who was passing on a neighbouring public way. Trinhall sued Colonel Dugout, the Secretary of State, and the College.

It was *held* (1) that there was no duty on the first two defendants to make careful inspection; (2) that the College would be liable under the principle of *Rylands* v. *Fletcher*, except that (3) the presence of the bomb was an act of God. The action therefore failed against all three defendants.

The officers for the May Term have not yet been elected.

TRINITY HALL LAW SOCIETY.

President . . . . . Dr. Carr.
Vice-President . . . Mr. C. T. Humphreys.
Secretary . . . . . L. E. Stephens.

Members, 52.

At the first meeting of the Michaelmas Term, Mr. A. L. Goodhart (Corpus Christi) read a paper on "The Constitution of the United States of America."

On November 19 the annual dinner was held, at which thirty-two members and twenty guests were present. The occasion was improved by the opportunity given to the Society of showing its appreciation to the Master, Dr. Bond, on his being made a Bencher of the Middle Temple.

The third fixture was an inter-College moot with the Caius College Law Club. Three cases, prepared by Dr. Carr, were argued, first in Roman law at the time of Gaius, and afterwards in English law at the present day.

At the first meeting in the Lent Term Mr. Todd, Clerk to the Justices of Cambridge, gave an interesting lecture on "The Police Court as Seen by a Clerk to the Justices."

On February 18 a most successful mock trial was held. The case—*Popkin* v. *de Vere*, for breach of promise of marriage—was heard before His Honour Judge Farrant and a mixed jury. The Hall was crowded beyond the available seating capacity for 150.

On March 4 Professor Hazeltine read an instructive paper to the Society on "The History of the Deodand."

BOOK REVIEWS.

Principles of Contract. By the Rt. Hon. Sir Frederick Pollock, Bt., K.C., D.C.L., of Lincoln's Inn. Ninth edition. London: Stevens & Sons, Lim. 1921. lx and 820 pp. (Price £2 2s.)

Sir Frederick Pollock's *Principles of Contract* has long been recognized by the legal profession in all common law jurisdictions as one of the classics of English legal literature. Its merits are outstanding and are due to the deep learning, acute reasoning power, and literary skill of its distinguished author. We possess in this treatise no dry-as-dust formal statement of the principles of the law of contract. The whole volume is suffused with the notion that the law has slowly developed to its present state, and that it is still in process of change. Not only is the common law of contract placed on the firm foundation of year-book lore and the later common law cases; but it is presented to us as modified in many of its parts by the influences of equity. Nor is the learned author content merely to state the contractual law and equity of the reports and the statutes. He subjects many of the decisions of the Courts to juristic criticism; and he gives us, here and there, illuminating comparisons with the contract law of America and foreign systems. Throughout the book there is close touch with the actualities of life and practice: there is theory running through the book, but it is theory which explains and elucidates the decisions, not theory which leads the student off into that juristic *Begriffshimmel* of abstract dialectics which Ihering ridiculed so amusingly and effectively in his *Scherz und Ernst in der Jurisprudenz.* In the words of Saleilles: "La science, en matière de droit, n'est pas l'art de construire des systèmes en abstraction; elle n'est que la mise au point des phénomènes juridiques que la pratique fait surgir." As Sir Frederick Pollock himself says in the preface to his new edition: "Legal rules exist not for their own sake, but to further justice and convenience in the business of human life; dialectic is the servant of their purpose, not their master. Reasonableness, no doubt, is the ideal of the Common Law . . . [But] the field of reason, as we understand it in English, includes many things outside strict logical deduction." This is sound doctrine.

The present edition of *Principles of Contract* is not merely a reprint touched up here and there by references to new cases; it is really and truly a new edition embodying substantive changes which bring the work into line with the present state of the law. The pages on the formation of contracts by correspondence have been recast, and an account of the earlier authorities placed in the Appendix. "I have come to regard this formerly vexed question," says the learned author, "as belonging to the class where, in the presence of conflicting and indecisive reasons of convenience (for I do not now think there is any decisive one), it is best to follow out elementary principles and not be alarmed if some of the minor consequences have a look of paradox." Attention is drawn in a footnote to Dr. Albert Cohen's monograph on *Contracts by Correspondence* (Paris, 1921); and it is worth pointing out here that this is an

attempt by a Continental lawyer to study an important aspect of English and American contract law by the use of cases and to compare it with the law of France. Dr. Cohen accepts Lord Herschell's theory in *Henthorn* v. *Fraser*, L. R. [1892] 2 Ch. 27, that acceptance by the post operates from the date of posting because of business custom ("the ordinary usages of mankind") and not because the post is a "common agent" of offeror and offeree. On contracts concluded by correspondence the student should also consult Dr. Kenny's learned notes in his *Cases on the Law of Contract* (1922).

A still greater change has been made in the present edition of the *Principles of Contract* by the excision of the chapter in former editions headed "Impossible Agreements" and the embodiment of its contents, so far as they appeared material, in a new chapter on "Conditions, and herein of Frustration." We agree with the learned author that "Impossibility" has quite ceased to be an adequate or helpful category in the law of contract. It is clear that "promises of a performance which at the time is obviously not possible do not occur in practice, for the plain reason that no man of ordinary sense will offer or accept such a promise. It is likewise plain that such a promise, if given, could not be treated in any rational system of jurisprudence as creating an enforceable duty." A still more potent reason for the author's changes in respect of "Impossibility" lies in the rapid growth of the doctrine of "frustration of the adventure" in cases which have arisen out of the late war. As the learned author points out, a performance that seemed possible, on reasonable grounds, at the time the promise was made may later on become impossible in a variety of ways. Sheer impossibility, however, we agree, "is only an extreme case of the hindrances that supervening accident may oppose to the fulfilment of a contract according to its true intention; and the modern conception of 'frustration' as the subject of express or implied exceptions, conditions and reservations goes far beyond this, and belongs to a constructive activity of our law which has not yet reached its final shape." Not only operations of war, but domestic acts of executive authority conferred for purposes of war thus come under the heading of "extraordinary interference" with contracts. Important recent cases, such as *Metropolitan Water Board* v. *Dick, Kerr & Co.* [1917] 2 K. B. 1; *Horlock* v. *Beal* [1916] 1 A. C. 486; *Tamplin S.S. Co.* v. *Anglo-Mexican, &c., Co.* [1916] 2 A. C. 397, are considered by Sir Frederick Pollock; and in these cases there are various forms in which the doctrine of "impossibility in law" caused by extraordinary interference, particularly "frustration," has been judicially expressed. Lord Sumner made a collection of these utterances in the *Bank Line Case* [1919] A. C., at p. 457; and we regret that Sir Frederick Pollock has not subjected them to his own criticism. He holds, however, that some of the *dicta*, even in the House of Lords, are in their literal form certainly too wide—for example, Lord Loreburn's in *Tamplin's Case* (*supra*). Judges, practitioners, and students who are concerned with "war-time impossibility of performance of contract" (including "frustration") will find enlightenment in Mr. McNair's valuable "*Legal Effects of War*" (1920), where the recent cases are all carefully reviewed and studied.

Sir Frederick Pollock has not taken account of the late case of *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Lim.* [1919] A. C. [House of Lords] 801. We regret this; for his comments on this case would have been illuminating. We question whether even

to-day the significance of this decision is fully appreciated by the profession. As remarked by Sir Frederick Pollock, "it was for a long time not clear whether a contract between A. and B. that one of them should do something for the benefit of C. did or did not give C. a right of action on the contract. . . . However, the rule is now settled that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may. . . . The final decision was in *Tweedle* v. *Atkinson* [(1861) 1 B. & S. 393]." This general principle that a third person cannot become entitled by the contract itself to demand the performance of any duty under the contract has been reaffirmed by Jessel, M.R., in *Empress Engineering Co.*, 16 Ch. D. 125, 129, and by Lindley, L.J., in *Re Rotherham Alum and Chemical Co.* (1883) 25 Ch. D., at p. 111. Lord Lindley says: "An agreement between A. and B. that B. shall pay C. gives C. no right of action against B."

It seems difficult to contend that *Les Affréteurs* v. *Walford* has not somewhat shaken this doctrine. In this case the only parties to a charterparty were the shipowners and the charterers. A clause in the charterparty provided that "a commission . . . is due to Leopold Walford (London), Limited [the brokers of the charterers], on signing this charter. . ." Although the respondents, the brokers, were not parties to the charterparty, in answer to an application by the respondents to join the charterers as plaintiffs the appellants agreed to raise no point as to parties, and the action was treated as if the charterers had been added as plaintiffs. The House of Lords held, approving and following *Robertson* v. *Wait* (1853), 8 Ex. 299, that the charterers, as trustees for the brokers, could enforce the clause relating to commission against the shipowners.

The opinions of their Lordships are worthy of careful study. The Lord Chancellor does not treat the brokers as in any sense parties to the contract. "A charterparty is, of course," he says, "a contract between owners and charterers, and it is elementary that, so far as the brokers are concerned, it is *res inter alios acta.*" Lord Birkenhead bases his judgment in *Les Affréteurs* v. *Walford* on the authority of *Robertson* v. *Wait*, and holds that the "charterers can sue under an agreement of this character as trustees for the broker." He quotes with approval the remarks of Jessel, M.R., in *In re Empress Engineering Co.*, 16 Ch. D. 125, 129, as an embodiment of the true principle. Jessel here says that "it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As Lord Justice James suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract." "In these cases," concludes Lord Birkenhead in the present case, "the broker, on ultimate analysis, appoints the charterer to contract on his behalf . . . [The] charterers can sue as trustees on behalf of the broker." Similarly, Viscount Finlay holds that the charterer has entered into the bargain, so far as commission is concerned, "in the interests of the broker and as a trustee for the broker"; that the terms of the charterparty as to commission are "binding upon the broker"; that it is "not open to the broker to set up a custom which is inconsistent with the terms of the clause which through his trustee in this matter he has entered into." Lord Wrenbury holds that "we have here to do with a contract between

two parties reserving a benefit to a third . . . Directly it is conceded that the broker, although not a party to the contract, can sue on the contract, inasmuch as he can sue by the charterer as trustee for him, it appears to me that the case really is over."

There are inconsistencies in these several expressions of opinion: and the case may raise difficulties in the future. The true ground upon which to rest the decision would seem to be that, in respect of the broker's commission, the charterers contract as the agents of the brokers with the shipowners. In this view of the case, the contract as to commission is really concluded between the brokers themselves and the shipowners, and the brokers sue, not as third persons, but as parties to the contract; and, if this view be sound, there would seem to be no necessity to join the charterers as parties to the proceedings for the recovery of the commission. On the other hand, if Lord Birkenhead's view, that the contract is, so far as the brokers are concerned, *res inter alios acta*, be sound, it is difficult to see why the brokers are allowed to sue on the contract at all: the charterers would seem to be alone entitled to sue the shipowners. *Robertson* v. *Wait* (1853), upon which Lord Birkenhead and Lord Wrenbury rely, was decided eight years before *Tweedle* v. *Atkinson* finally decided that a third person cannot sue on a contract made by others for his benefit. Does not *Les Affréteurs* v. *Walford* now infringe somewhat upon this hitherto established doctrine? It is true that the brokers do not sue alone; the charterers are joined with them as co-plaintiffs. Some support for the case may be found, therefore, in the old precedent of *Gregory* v. *Williams*, (1817) 3 Mer. 582, where a third person for whose benefit a contract was made was allowed to join as co-plaintiff with one of the contracting parties against the other. It was not suggested in this case that the third-party beneficiary could have sued alone either at law or in equity. Sir Frederick Pollock holds (p. 228) that the true view of *Gregory* v. *Williams* appears to be that the transaction amounted to a declaration of trust for the benefit of the third party.

H. D. H.

A Digest of English Civil Law. By Edward Jenks, B.C.L. (Editor), W. M. Geldart, B.C.L., W. S. Holdsworth, D.C.L., K.C., R. W. Lee, B.C.L., K.C. (Quebec), J. C. Miles, B.C.L., Barrister-at-Law. Second edition consolidated. Two vols. ccxlii and 1422 pp. Index, pp. 166. London: Butterworth & Co. 1921. (Price 35*s.* per volume.)

The first edition of this work, which appeared in eleven instalments during the years 1905-17, was originally undertaken by the editor and four of his former colleagues of the Oxford Law School at the request of the Berlin Society for Comparative Jurisprudence and Political Economy as a part of its project of publishing a series of handbooks on the legal systems of modern civilized communities. The general intention of the Society was that each one of the handbooks should be modelled after the arrangement of the German Civil Code (*Bürgerliches Gesetzbuch*) of 1900; but, in the case of the English handbook, the Society offered the authors full discretion to depart from this arrangement of subject-matter if such

a course seemed to them desirable. In the execution of the design the English authors preserved the general pattern of the Code by dividing their work into five Books, as follows: I: General (Mr. Jenks); II: Obligations (Professor Lee and Sir J. C. Miles); III: Things or Property Law (Mr. Jenks); IV: Family Law (Professor Geldart); V: Succession (Dr. Holdsworth). The writing of these five Books took years of co-operative work. Although the separate Books were prepared by different authors, each one of them was subjected to the criticism of all the authors jointly before it was finally published. On its gradual appearance in instalments the work was welcomed by the legal profession and by teachers and students of English law in the British Empire and the United States of America; while in foreign countries it was also greeted as a courageous and successful effort to present the fundamental rules and principles of a large part of English private law in an orderly and succinct manner after the fashion of Continental codes of civil law. The first Book—the one dealing with general matters, such as persons, things, legal acts, time, limitation of actions, and self-help—was translated into German, provided with an elaborate commentary by two German jurists, and published in three instalments at Berlin: (1) 1905, (2) 1906 (Dr. Schirrmeister); (3) 1909 (Dr. Prochownick).

The present edition of the *Digest of English Civil Law* is a consolidation, in two volumes, of the eleven separate instalments of the first English edition; and, although he has received some assistance from his colleagues, Dr. Jenks, the editor, is solely responsible for its preparation. He has revised the text of the work and brought it up to date; while, in place of the former fragmentary lists in the eleven instalments of the first edition, he has now added entirely new tables of statutes and cases, as well as a new and comprehensive index. Only those who are familiar at first hand with the exacting nature of work of this kind can fully realize how much painstaking research lies at the basis of this new edition. We offer our hearty congratulations to the learned editor and authors on the successful accomplishment of the difficult work of consolidation and on the appearance of their *Digest* in its new and useful form.

The recent death of Professor Geldart, which creates a great gap both in the circle of our law teachers and in the legal profession generally, removes one of the authors of the *Digest* from the reach of any words of ours. We had learned to expect learning and brilliance in anything which he chose to write; and the Book on Family Law in the present work is no exception. Although Professor Geldart's writings are few in number, they will hold an honoured and a permanent place in the literature of English law.

There are several reasons why we are confident that the *Digest of English Civil Law*, in its new consolidated form, will be most useful to the legal profession and to legal teachers and students. Not the least of these reasons is its presentation of basic rules and principles in such a way as to emphasize the fact that English private law is a legal system and not a mass of unrelated details. In times past most of the digests of English law have been arranged in an alphabetical order; they have embodied a series of many separate articles or notes on different topics without much connexion one with another. The fashion in this matter, which was set by the *Abridgments* of the Year Books long ago, has prevailed down to our own time. Lord Halsbury's *Laws of England*, a monumental work of great value, represents in a striking manner this traditional mode of dealing with English legal materials. Some of the older

alphabetical abridgments or digests, such as those of Fitzherbert, Brooke, and Rolle, still serve very useful purposes in professional and scholarly work. Nor are they without value from the point of view of arrangement of matters; for it is easy to find what one wants by looking under the appropriate letter. In the case of *City of London* v. *Wood*, 12 Mod 669 (at 689), Chief Justice Holt assures us that Serjeant Rolle's *Abridgment des plusieurs Cases et Resolutions del Common Ley* (1668) was "published by my Lord Hale, perhaps the greatest man of the law that ever was." Particular interest attaches therefore to "the publisher's preface directed to the young students of the common law" which is prefixed to Rolle's *Abridgment;* for, if Sir Matthew Hale wrote it, we may still read that learned jurist's argument in defence of the alphabetically arranged books of the common law. "Men not much acquainted with the study of the Common Laws of England," says Hale, "though otherwise of good parts and possibly well acquainted with University learning, pretend two great prejudices and exceptions against the study of the Common Law, viz: 1. That it wants clear evidence of reason. . . . 2. That it wants method, order, and apt distributions, and this hath bred some prejudice against it, not only in men much addicted to subtil learning, but also in the Professors of the Civil Law, who think that Law much more methodical and orderly than the Common Law. . . . As to the second, concerning the Immethodicalness of the Common Law, I shall say this: (1) That the Common Law is reducible into a competent Method, as to the general Heads thereof, and every Student doth, or may easily Form unto himself a general Digestion of the Law, accommodate to his Memory and Use. (2) But it is true, that all the particulars, in respect of their multitude and variety, are not easily reducible into a Scholastick method, but they recompense that inconvenience by their particularity and useful Application to particular Occasions. . . . It is true, the Body of the Civil Law is digested into general Heads, which are like common Boxes, in which many particulars are placed. . . ."

Hale wrote these words over two hundred and fifty years ago. At the present time the abridgments or digests of the law arranged "alphabetical-ment" do not hold the field undisputed by rivals: and there is a sense in which we may say that these rival digests follow in some sort the "scholastick method" mentioned by Hale and that they give us indeed the "general heads, which are like common boxes, in which many particulars are placed." The long predominance of the A to Z method of digesting the English laws has tended to obscure the fact that common law and equity are much more than a series of isolated topics and that they are in fact a system of law whose many parts are closely related to one another. During the latter part of the nineteenth century, Stephen's Digests of the Criminal Law, the Law of Criminal Procedure, and of the Law of Evidence were the forerunners of a new series of digests based on systematic rather than alphabetical arrangement. As remarked by Lord Mansfield, in the case of *R.* v. *Bembridge* (1783) 3 Doug. 332, "the law does not consist of particular cases, but of general principles which are illustrated and explained in those cases." We believe that Sir James Fitzjames Stephen was right when, in the introduction to his *Digest of the Law of Evidence*, he said that the law of England is "capable of being thrown into a form at once plain, short, and systematic." Other English jurists have held similar views.

Stephen's example inspired Sir Frederick Pollock's *Digest of the Law of Partnership.* Sir Mackenzie Chalmers' *Digest of the Law of Bills of Exchange* and Strahan and Kenrick's *Digest of Equity* are works of a similar kind. Some of these private digests, notably those of Pollock and Chalmers, have been used as the basis of Acts codifying the branches of law which they covered.

The *Digest of English Civil Law* by Jenks, Geldart, Holdsworth, Lee, and Miles, is the latest and the most ambitious of all those private digests which owe their original inspiration to the work of Macaulay and Stephen. It is more ambitious than any of the others, for it covers a wider field—not only one branch of the law but several. Embraced within it is a large part of the law which concerns the private jural relations of persons and which we may designate the civil or private law in contrast with constitutional, criminal, and procedural law and other branches of the public law. No other work attempts to cover so wide a field of English law in a form which, to quote Stephen's words once more, is "at once plain, short, and systematic"; and in this respect the present *Digest* is unique in English legal literature. Nor in giving their work the general form of Continental civil codes have the authors twisted their English materials to fit foreign moulds. All of the peculiarities which mark off the English private law from the private laws of France, Germany, Italy and other Continental countries reappear in the present work; but they reappear in orderly arrangement after the fashion of a Code. Some features of the authors' arrangement of subject-matter may be open to criticism. Thus, while we agree that trusts and mortgages are properly placed in Book III under the Law of Property, we think that equitable obligations might have been given some place under the Law of Obligations in Book II; for in a systematic digest of the English Law of Obligations equitable obligations surely occupy a place of importance beside obligations *ex contractu* and *ex delicto* and obligations quasi-contractual. The authors' notes to the 2223 sections of their *Digest* form a valuable feature of the work. Not only do the authors refer to other cases and statutes bearing on the subject-matter of the sections, but they give us helpful historical explanations.

The *Digest of English Civil Law*, even though it has the form of a codification, is not a Code. As the learned Editor points out in his preface, "a Digest differs from a Code, mainly in that it professes merely to state the rules which are covered by existing authority. It claims—at least, when it is the work of purely private authors—no other respect than that which is derived from a belief that it represents an honest, intelligent, and industrious attempt to reduce the chaos of existing materials to simplicity and order." As a concise digest of many of our cases and statutes of the private law, the present work will be useful to practitioners, teachers, and students alike. Whether or not it will ever serve as one of the bases of a future Civil Code we do not venture to prophesy. Codification of English private law on a large scale is still one of the problems of the future: it is not a question of present concern. Valuable as the present work is, it will not displace the larger and more complete treatises and digests. This is indeed not the aim of the authors. The chief merit of the work lies in its systematic arrangement and its clear concise statement of fundamental rules and propositions. It is an introduction, not an exhaustive compendium. It is a pleasing gateway to the vast garden of decisions and statutes which lies beyond and which

the lawyer spends his lifetime in exploring and surveying. So far as students are concerned, we may employ the words which Hale uses in reference to Rolle's *Abridgment:* "It is a book published for the help and benefit of students, not to abate their industry, but to encourage it." If, furthermore, the student uses the *Digest* as in some measure the basis of a commonplace book—Hale suggested this way of using Rolle's *Abridgment*—he will be able to note in the margins the new cases and statutes as they appear. In Book IV: Family Law, for example, he will be able to insert the appropriate references to two very recent cases—*Goldstone* v. *Smith* (*otherwise Goldstone*) on jactitation of marriage, and *Rutherford* v. *Rutherford* on the revocation of a decree *nisi* in divorce.

H. D. H.

Delegated Legislation. Three lectures by Cecil T. Carr, LL.D. Cambridge: at the University Press. viii and 72 pp. (Price 7*s.* 6*d.* net.)

Measures of delegated legislation—enactments "statutory" (in Austin's sense) as regards the generality of the form in which they are couched, yet made only by subsidiary authorities—have assumed within living memory a sudden and an increasing prominence in our legal system. It was high time that some writer familiar with them should, in the interests both of practising lawyers and of scientific jurists, present a compendious view of the causes which have rendered them necessary, the methods of their creation, and the safeguards which control their action. Dr. Cecil Carr deserves the gratitude of the legal world for having supplied this need by the able and attractive lectures which he delivered last year at Cambridge and which he has now issued in print for the benefit of a wider public.

Maitland taught us many things; and not the least valuable was the lesson that a learned law-book may be written with a smile. The veterans amongst us, who began their studies of English law half a century ago or more, remember painfully the arid character of even the elementary text-books that were then put into their hands. Blackstone was an exception amongst the older writers, and Joshua Williams amongst the more modern ones. But the others were only dry-as-dust compilers. And if they passed beyond mere quotation to make original comments on what they quoted, it was only to put before us—like Molière's physicians—"un pompeux galimatias, un spécieux babil, qui donnait des mots pour des raisons." Happily, Maitland and Sir Frederick Pollock changed all that; and Dr. Carr treads firmly in their steps, manifesting a complete mastery of his mass of details, a power of acute criticism, and a pleasant humour.

One great province in which our Executive authorities exercise a wide influence over the creation of law is the holding of those departmental inquiries which result in the issue of a Provisional Order. But such action goes for nothing until the sanction of Parliament has been conferred upon it; a Provisional Order Confirmation Bill must be passed. Thus in them there is no delegation of any power of law-making; so

those Orders, numerous and important as they are, do not fall within the scope of Dr. Carr's volume.

He is concerned only with those still more numerous Rules and Orders that do not require any express sanction by Parliament—though in some instances they are directly subject to the risk of a Parliamentary veto. These enactments, though of less fundamental importance here than in France or Italy, have already attained in England such a development as to afford Dr. Carr an ample theme. Our now overburdened House of Commons is eager, and wisely eager, to save time by enacting general principles alone; and leaving to humbler but more expert hands the tedious task of working out the details necessary for enforcing them. A very brief experience of Parliamentary life suffices to give even a newly arrived legislator a high admiration of the intellectual powers of the leading Civil Service officials with whom he is brought into contact; and perhaps a somewhat dissimilar estimate of the average mental level of the colleagues who join with him in law-making. It is not surprising that the device of delegating legislation works with much practical efficiency.

Dr. Carr gives (pp. 48-56) an interesting historical sketch, showing the great change between 1820—the statutes of which year afford only very rare instances of any delegation of legislative authority—and 1920, when more than half of the year's statutes entrusted to subordinate bodies the power of making minor rules on the subject to which each particular enactment related. "The annual volume of Public General Statutes for 1920 occupies less than 600 pages; the Statutory Rules and Orders for the same period occupy about five times as many" (p. 2). For, as our author vividly says (p. 18), an Act of Parliament small as a grain of mustard seed may be the parent of a whole forest of Rules and Orders. "Who could foresee that the Defence of the Realm Regulations would embrace the taking over of mines, railways, shipping and the liquor industry . . . and the whistling for cabs in London?"

Dr. Carr adopts the current opinion that even this vast mass of legal rules falls within the doctrine that every man is bound to know the law. "The duty to know Delegated Legislation must," he says, "be the same as the duty to know the Acts of Parliament which gave birth to it" (p. 5). But prevalent as this opinion is, it may be questioned if any judicial decision has as yet confirmed it. And it is difficult to believe that the average man in the street is legally presumed to be familiar with the contents of the byelaws of even the very same town or county that he lives in. For even its judicial tribunals are not allowed to act upon such a byelaw (although familiar to them for a dozen years past) until its existence has been demonstrated to them anew by the production of a copy authenticated by the seal of the Council legislating. (See 45 & 46 Vict. c. 50, s. 24; 51 & 52 Vict. c. 41, s. 75; *cf. Drew* v. *Harlow*, 39 J. P. 420; *Timothy* v. *Fenn*, 74 J. P. 123.) Indeed until so recently as 1893, when the Rules Publication Act was passed, "delegated legislation was almost undiscoverable" (p. 44). And even now the system of official publication which that statute created "does not cover the whole field;" as Dr. Carr (pp. 44-47) shows in detail.

But whether or not the mass of our Delegated Legislation be sufficiently "cognoscible" to have satisfied Bentham, its value and indeed its necessity are beyond doubt. None the less, the aptitude to err is inseparable from human affairs; and even the best of subordinate law-makers are human. They may drift into making rules that are unreasonable or even unjust.

Dr. Carr, in a striking chapter on Safeguards (pp. 27-41), consequently works out five precautions which Parliament, whenever it delegates a power of legislation, ought to take in order to prevent its being ill-exercised.

Many readers of this brief treatise will, like myself, close it as one rarely closes a law book—with a wish that it were longer.

COURTNEY KENNY.

Military Law and the Supremacy of the Civil Courts. Edited by RICHARD O'SULLIVAN, of the Middle Temple, Barrister-at-Law. vii and 127 pp. London: Stevens & Sons, Lim. 1921. (Price 7*s.* 6*d.* net.)

IN the introduction to this work the author states that its main purpose is to place at the disposal of those interested the judgment of Mr. Justice McCardie in *Heddon* v. *Evans* (35 T. L. R., p. 642) and claims for the judgment an importance which will probably surprise no one more than the learned Judge himself.

As will be remembered, that case dealt with the rights of redress of a soldier subject to military law against his superior officer. In that part of the judgment which deals with legal questions there is a comprehensive review of the authorities, and the learned Judge, upon the authorities, came to the conclusion that, of the two main points raised, one had been finally and conclusively determined and that the other one was only open to discussion in the House of Lords, and was not open at all upon the facts found by him. A judgment of first instance of this character hardly seems to demand a separate treatise, even of the dimensions of the book before us.

The introduction, so far as it is relevant to the judgment at all, consists of a short history of the law, culled from well-known sources, and a paraphrase of parts of the judgment with amplified references. The judgment itself is extremely clear; it will not be uncharitable to say that the introduction is no clearer. The only outstanding feature of originality is the fact that the author, to the extent of some twenty pages of introduction and five pages of oddly interpolated footnote, makes an attack upon the judgment of the Privy Council in *Ex parte Marais* [1902] A. C. 109. That well-known decision was that of an exceptionally strong board, since followed in a unanimous judgment of the Court of King's Bench in Ireland in *In re Allen* [1921], a case which is dismissed by Mr. O'Sullivan in a somewhat summary fashion. The courage displayed in the attack is noteworthy, especially in view of the fact that *Marais' Case* deals exclusively with martial law, a topic which, as Mr. Justice McCardie points out, is quite foreign to the points at issue in *Heddon* v. *Evans*. The author also does not seem to have given due weight to the consideration that the title of his work, being "Military Law," would seem to exclude the serious discussion of any matter of martial law.

The judgment, as printed in the book, appears to be a reproduction of the transcript, but the substitution of the word "exercise" for the word

"reverse," which is in the transcript, makes nonsense of one passage (p. 83).

The method adopted of mixing up the notes with the text of the judgment is one which might with advantage be altered in a future edition.

The General Eyre. By William Craddock Bolland, M.A., with an Introduction by Harold Dexter Hazeltine, M.A., Litt.D. 1922. Cambridge University Press. xiv and 98 pp. (Price 6*s*. net.)

We do not know what better ideal a lecturer can have in mind than that which Mr. Bolland has achieved in the short course which he delivered at London University on "The General Eyre." He has given a concise and graphic account not merely of a legal institution, but also of the social England that formed its background; and he has imparted the stimulus which any true researcher must always give to those whom he teaches. He has painted a vivid picture with the skill that might be expected of one whose illuminating introductions to *The Eyre of Kent* and *Select Bills in Eyre* are familiar in the Selden Society Series. We may not perhaps agree unreservedly that the picture is an exact portrait, and indeed we think that the subject of it might have been given a little more amiable expression without any sacrifice to flattery. Mr. Bolland's view of the general eyre is that its main purpose was not the administration of justice, but the extortion by the King of as much money from his subjects as he could get, and in any way that he could get it. No doubt this is substantially true of particular Kings and particular eyres, but we hesitate to accept it as a statement of universal application; and the quotations on p. 18 are too general or too guarded (this is certainly so with the one from Maitland) to resolve our doubts. Indeed, Maitland himself indicates that the general eyre of 1221 in the county of Gloucester was necessary enough for public order, for none had been held for more than seven years, and "an enormous mass of crime had gone absolutely unpunished in the days of King John." It may be conceded at once that general eyres were not popular with everybody, and that in certain districts at various periods they were cordially detested by all. Mr. Bolland's evidence of this can be reinforced by more drawn from the Parliament Rolls. Several times in the fourteenth century the Commons begged the Kings not to send eyres. Now it is a particular county that wants none to come until it has had time to set its house in order; now it is the people generally who ask for three years' pause in them as a breathing-space while an aid is being levied, and the Council recommends that the request be granted "in relief of the people" if it please the King and no sudden necessity arise. Then war upset the country so much that we get a petition in 1371 that eyres be suspended until the war is over, and six years later in a fit of pessimism (not unknown to most of us) the request is repeated with an alteration of the period to "the duration of the war or for 20 years." Yet it is curious that no petition is traceable in which the complete abolition of eyres is implored. There is always some qualification either as to time or circumstances. Even where there is reference to the trouble and impoverishment

which they caused, there is an admission of their usefulness "in horrible cases" (we think that this is quite as likely to refer to outrageous disorder as to absolute bankruptcy of the King, which is Mr. Bolland's view in *The Eyre of Kent.* S.S. vol. 24, p. xxxvii, note 2). And if they were an unmitigated nuisance this is hard to explain. In fact, it does not follow that because an institution is unpopular, it is a crying abuse. The material question is, "Who are the people who think it unpopular?" With wrongdoers and with those who had to perform irksome gratuitous duties, the itinerant justices were naturally unpopular. But then the prisoners at present awaiting trial in Bedford gaol are not likely to speak well of the Judge coming on the next assize to Cambridge; nor are the jurors and witnesses summoned to attend it. Indeed, the draft made upon a mediaeval man's time by his civic duties was paralleled by the suspension of grand juries during the recent war. Yet nobody disputes the usefulness of the Judges' circuits. Again we do not think that complete justice is done to that oft-cited tale of the Cornishmen who in 1233 fled to the woods in terror of the itinerant justices, unless it be added that thereon an order was made that all might return to the peace of the King, provided that they obeyed and lived according to the laws of the kingdom of England. A guilty conscience needs no accuser, and one is tempted to ask what some of those who fled had been doing. Mr. Bolland naturally gives some attention to the general eyre in London in 1321, and he seems to think that the city itself and its sheriffs both in this eyre and in others had a hard time of it. These officials were under judgment because, through lack of organization, they were not present to meet the Judges. Yet they could hardly expect to go quit when they had not done one of the very things they had been expressly told to do. What would a Judge on circuit nowadays think of a sheriff who is not there to meet him? Moreover, no eyre had been held in London for forty-four years, and is it not possible that some abuses needing reform had sprung up in the meanwhile? It was not a generation earlier that the city clerks and officers had been so corrupt that the Londoners themselves made a complaint to Parliament. In the illustrations drawn from the Kent Eyre on pp. 55-57, something may fairly be said in favour of the itinerant justices. On an impartial view, it is impossible to say that there is no dereliction of duty if a bailiff lets prisoners escape in the circumstances there put; and on p. 58 where Mr. Bolland thinks that the sheriff was "guided by elementary common sense," it is arguable that he was misled by elementary ignorance of the law.

The decay of the eyres is attributed to increased powers given to the Justices of Assizes and other commissions, and Mr. Bolland can trace none after 1336. But if there were no later ones, their memory was green in 1348, for the Commons then pray for a temporary cessation of eyres of justices, as well of the Forest as of the Common Pleas, and general inquiries throughout the land.

The points which we have suggested do not in the least detract from the value of Mr. Bolland's admirable book. They are only intended to emphasize the useful side of what might be, and very often was, an oppressive institution, and the author himself indicates in his preface that there was such a beneficial side, and is careful to impress it on his readers later when he speaks of procedure *Quo warranto* and by bill. There is perhaps no more reason for believing that the general eyre was

nothing but the constant engine of royal oppression than that the Star Chamber of a later period was. In knitting to central, stable, government a country loosely organized, full of corrupt and unscrupulous great officials whose local influence hypnotized their inferiors, both these institutions did good work. And it is important that every student should realize this as well as the evil that they inflicted.

We have only to add that Professor Hazeltine's brief introduction contains several valuable suggestions for the lines that future research on the general eyres should take.

P. H. W.

A Concise Legal History. By Edgar Hammond, B.A. (Oxon), of Lincoln College. 1921. Sweet & Maxwell, Lim. (Price 10*s.* 6*d.* net.)

A book purporting to supply a sketch of legal history for students should at least aim at lucidity and accuracy. The volume before us answers neither of these requirements. It appears to have been based on notes from various text-books of repute, but very little attention has been devoted to verifying the statements or references. There are a great number of errors which perhaps may charitably be put down as "printers' errors," but, in some cases, it seems impossible to plead this excuse. Thus, the well-known case of *Ashford* v. *Thornton* appears in three places as *Ashwood* v. *Thornton*, *Taltarum's Case* as *Tattarum's Case*, *Chasemore* v. *Richards* as *Casemore* v. *Richards*. At pp. 126-7 we have estate *per* autre vie four times and cestui *qui* vie three times.

But errors of substance are still more serious. For confusion mixed with error it would be difficult to match the account of the Parliament Act, 1911, on p. 85: "Under this Act, when the House of Lords refuses to pass a particular measure, the House of Commons can, in spite of the opposition of the Upper House, present it to the Crown for its approval, and then, upon the Crown concurring, the measure becomes law after a period of two years. This is, provided the proposed statute is not to effect any alterations in the succession to the Crown, for in that case the Act of 1911 specially requires the concurrence of the House of Lords." Has the author read the Act?

At pp. 125-6 we are told, "'By the Fraudulent Devises Act, passed under William and Mary, it was enacted that where land by will was devised to a stranger, he was *not* to be liable to satisfy *even* specialty creditors out of his devise." The italics are ours. At p. 45 we are told that *Hampden's Case* was decided by the Court of Star Chamber. At p. 81 it is stated that the "Laws of Oleron were compiled at the Committee (*sic*) of Oleron." There are a very large number of other errors which we have noticed but which it would take up too much space to specify. It is clear that if this work is to be of much utility it must be drastically revised.

D. T. O.

Outlines of Constitutional Law. By Dalzell Chalmers, B.A. (Law Tripos, Cambridge), Barrister-at-Law, and Cyril Asquith, Barrister-at-Law, and late Fellow of Magdalen College, Oxford. London: Sweet & Maxwell, Lim. 1922. (12*s.* 6*d.* net.)

This book supplies a distinct need and will be found most useful by students preparing for examinations in Constitutional Law. Unfortunately, the work is marred in many places by slip-shod expressions and a number of errors have been allowed to stand owing to lack of careful revision of the text. Examples of the former are found at p. 23, "A general warrant was brought into play"; at p. 25, where we are informed that in England officials "do not possess anything like the same immunities as they do in France"; at p. 251, "when an admonition is on the *tapis*"; at p. 307, "The sovereign members of the Covenant of the League of Nations"; at p. 316, "We hear of another jury . . . being *impounded*" and "All these persons were witnesses after a fashion"; and at p. 312, "In 1852 Doe and Roe died by the hand of a common Law Procedure Act." We could give a large number of other instances. An example of the latter may be found at p. 263, "It (the Confirmatio Cartarum) provided that aids tasks and mainprizes (*sic*) be not taken in the future." The word in the statute is "*prises*." We need hardly say that "mainprize" is a very different matter. On p. 184 it is stated that the office of Justiciar was dispensed with in Edward I's reign. It had already disappeared in the reign of Henry III. The creation of a Chief Baron of the Exchequer attributed to Edward I (p. 184) is probably antedated. The office does not appear definitely until the next reign. On p. 253, in dealing with the use of the term "assize" as indicating a law, the example given (Assize of Novel Disseisin) is unfortunate. The short paragraph on pp. 291-2 regarding the later history of the trial of disputed elections is inadequate and misleading. Although the authors are acquainted with Professor Pollard's recent work, *The Evolution of Parliament*, and, presumably, with Professor Maitland's researches on the subject, they still adhere to the description of the Parliament of 1295 as representative of the "Estates of the Realm" (pp. 13 and 278).

We cannot agree with the view taken by the authors (p. 58), "This case [*Wise* v. *Dunning* [1902] 1 K. B. 167] probably overrules the earlier decision in *Beatty* v. *Gillbanks*." It would be hypercritical to question the statement (pp. 37 and 235) that peeresses in their own right cannot sit in the Lords, as Lady Rhondda's case is still under consideration, although a committee of privileges has reported in favour of her claim. But in view of the Act of 1919, it would perhaps have been wise to have intimated that the matter was doubtful.

On the whole, we think that if students follow the advice contained in the preface to treat the volume as a *vade mecum* and use it "to condense knowledge previously obtained from the standard works," they will find it a great help in their studies. With careful revision and amplification its utility would be greatly enhanced.

D. T. O.

Law of Carriage by Railway. By H. W. Disney. Fifth edition. London: Stevens & Sons, Lim. 1921. (12*s.* 6*d.* net.)

This book has now reached its fifth edition and established its position. To students it gives an admirable view of an important topic, while the practitioner will obtain at any rate reliable "first aid" from it more rapidly than from the more comprehensive treatises with which it does not claim to compete. Two remarks may be made, which are suggestions, not criticisms. (1) *Denton* v. *Great Northern Railway* seems to deserve more intensive treatment than is meted out to it in six lines on p. 201. We are told the plaintiff "had a good cause of action against the company," but not whether it was on contract or for the tort of deceit, or both, nor whether the cause of action in tort has survived *Derry* v. *Peek*. (2) We are told, rightly of course, that the Railway and Canal Traffic Act, 1854, "does not make a railway company common carriers of passengers" (p. 136), and that "the liability of a railway company for the safety of passengers depends . . . on the law of negligence" (p. 137). But the expression "common carrier" connotes not only an exceptionally burdensome degree of liability in carrying goods, often described as a duty of insurance, but also the obligation of certain carriers by reason of their public profession to carry any goods which may be tendered, *or passengers who may tender themselves*, for carriage together with the proper remuneration. The application of this second meaning of the expression to railway companies might perhaps receive consideration in the next edition (see *Clarke* v. *West Ham Corporation* [1909] 2 K. B. 858). And, as Mr. Disney hints in his preface, a new edition will be needed before long; for the recent war is still affecting railway organization more than that of most other industries.

A. D. McN.

Leake's Law of Contracts. Seventh edition. By A. E. Randall. London: Stevens & Sons, Lim. 1921. (£2 10*s.*)

This "old stager," which first saw the light in 1867, is now well into middle age, but in the hands of the learned editor it preserves the vitality, if not the bodily form, of a youngster. It has grown fatter, which is in part due to its wealth of cases (the Table of Cases requires 288 pages); but "Leake" is essentially the *vade mecum* of the practitioner, who must have his cases—a need which the learned editor well knows how to supply, as the editorial notes of the *Law Quarterly Review* continually show. May we make one or two suggestions? (1) Some eight pages are devoted to contracts in restraint of trade; but they contain no reference to the very important judgment of Younger L.J. in *Attwood* v. *Lamont* [1920] 3 K. B. 571, in which an estimate is formed of the consolidated effect of recent House of Lords' decisions on this subject. (2) Again, one or two cases are referred to in which a covenant in restraint of trade was severed, but nowhere do we find the limits of the power of severance, or the supersession of "the blue pencil test" which misled Bailhache and Sankey JJ. in the Divisional Court, and was overruled by the Court of Appeal, in *Attwood* v. *Lamont*, *supra*.

(3) Again, the statement on p. 587 that "illegality supervening by the law of a foreign country in which the contract is to be performed does not, in general, excuse a breach of the contract," etc, might receive reconsideration in view of *Ralli Brothers* v. *Sota y Aznar* [1920] 2 K. B. 287, which is mentioned elsewhere in the book. (4) On p. 396 the Infants' Relief Act is, by a slip, attributed to the year 1870. (5) One may not like the judgment of Horridge J. in *Phillips* v. *Brooks* [1919] 2 K. B. 243, on the effect of fraud as to the identity of a party to the contract, but to ignore it entirely seems rather drastic. While making these suggestions, we wish to bear testimony to the excellence of the book and the care with which it is edited.

A. D. McN.

Contract of Sale of Goods. Six lectures by the late Judge Willis, K.C. Second edition, by W. Nembhard Hibbert, LL.D. (Lond.). London: Sweet & Maxwell, Lim. (10*s.* net.)

We can heartily commend to students these lectures by the late Judge Willis, and also his equally stimulating lectures on "The Law of Negotiable Securities." If the manner of their delivery was equal to their matter, the hearers were fortunate. Judge Willis learned his law before the passing of the Sale of Goods Act, 1893, and learned it in a way which is only possible from the cases; the code makes it, superficially, too easy, and the study of it must be accompanied by the study of the decisions on which it rests. At the same time, it has always seemed to us in reading these lectures that the lecturer, born and bred in the pre-code days, betrays just a note of impatience with the Act of 1893, and occasionally a certain reluctance to grasp the fact that since 1893 the law must be found in the provisions of the code in so far as it covers the ground. For instance, Lecture IV., on the fourth section of the Act of 1893, fails to bring out clearly the three possible meanings in which the word "acceptance" may be used in connexion with the contract of sale of goods: (1) the acceptance of an offer, thus forming a contract: (2) acceptance as a part of "acceptance and actual receipt" being one of the alternative requirements of section 4 of the Act, evidencing a contract so as to make it enforceable by action: and (3) "acceptance" under section 35 so as to pass the property in the goods to the purchaser where it has not already passed to him. We suggest to Dr. Hibbert that in another edition a little sacrilege applied to the text of Lecture IV. would be justified. Dr. Hibbert has added a few notes to this, the second edition, drawing attention to some of the decisions of the past twenty years. We do not consider that his statement, in a note on p. 68, to the effect that in *Morris* v. *Baron* [1918] 1 A. C. 1, the majority of the House of Lords "laid it down that an agreement required to be in writing by the Sale of Goods Act, 1893, s. 4, is invalid *for all purposes* if not in writing," is justified. Lord Finlay L.C. says (at p. 11): "The agreement . . . in this case is not under that section [4] invalid as was the agreement in *Noble* v. *Ward* under s. 17 of the Statute of Frauds. *It is only not enforceable by action.*" Lord Mersey's weighty *dicta* in *Taylor* v. *Great Eastern Railway* [1901] 1 K. B. 714, have still got to be reckoned with.

Leading Cases on International Law, with Notes containing the views of the Text-Writers on the Topics referred to, Supplementary Cases, Treaties, and Statutes. Vol. I., Peace. By Pitt Cobbett, M.A., D.C.L. Fourth edition. By Hugh H. L. Bellot, M.A., D.C.L. London: Sweet & Maxwell, Lim. (15*s.* net.)

This is a new edition of a well-known book, and that it has been ably brought up to date is guaranteed by the name of the editor. The idea of the book was an admirable one, and has been fully justified by the extensive use which the book has attained. On the other hand, it is to be doubted whether another edition of the book will be much needed. It is not easy to bring up to date by means of footnotes, glosses, &c, a book originally written before the War. For example, see page 55, in which the change from Colonial to Dominion status of Canada, &c. is treated in three lines of small print (by the way, it is inaccurate to say that a Canadian Minister has been appointed to Washington).

Within the limits suggested by these remarks, there is nothing but praise for the book, though the printing is careless; see page 45, bottom line, for a typical misprint. A similar book rewritten in the light of the War experience would be several times as useful.

G. B.

The Student's Legal History. By R. Storry Deans, of Gray's Inn, Barrister-at-Law, LL.B. Fourth edition. ix and 218 pp. London: Stevens & Sons, Lim. 1921. (15*s.*)

The author has made in the present edition a few changes and additions; he has, for instance, referred to the Juries Act, 1918, the Sex Disqualification (Removal) Act, 1919, and the Administration of Justice Act, 1920. Substantially, however, the present edition reproduces the subject-matter of the third edition (1913).

No doubt the book will continue to be useful to many students who desire to acquire in a great hurry certain main points in preparation for the Bar Examination. But if the author wishes to give students a scholarly grounding in the outlines of the history of English law, he should seriously consider the desirability of a thorough revision of his little book. During the last two or three decades learned historians have written many works and essays on various aspects of English constitutional and legal history. This extensive and valuable literature ought to be mastered in all its details and the results embodied in a future edition of the present book.

The author has very properly treated the subject under successive main periods, beginning with the period before the coming of the Normans; but under these periods he has not arranged his matters with much idea of system. We doubt whether the student will put down the book after its perusal with many clear ideas of the general course of English institutional and legal development. Many matters, again, are treated far too summarily to be of any real educational value. Furthermore, we cannot

think that it is desirable to leave at the end of the book, as a sort of appendix, the brief accounts of the history of the courts, land tenure, and the king's peace. Chapter VII, which deals with matters in the period from George IV. to the present day (1921), brings the history to a natural conclusion. Chapters VIII—X, which consider the three separate subjects just mentioned, from the earliest times to the present day, ought to be broken up and their parts placed in their appropriate places in Chapters I—VII.

It is quite clear that *The Student's Legal History* is still intended to be a cram-book, and as such it has its uses. But it is also quite clear that if a cram-book is to be of any real value in the legal education of backward students it must embody the results of the latest research, give a clear and connected account of development, and be much more than a collection of notes, many of which are very brief, arranged more or less in a chronological order. We look forward to seeing a new and better edition at some future time.

H. D. H.

A Selection of Leading Cases in the Criminal Law, with Notes. By the late Henry Warburton, and Claude H. Grundy, Barristers-at-Law. Fifth edition. xxx and 571 pp. London: Stevens & Sons, Lim. 1921. (20*s.*)

The last edition of this well-known collection of cases on criminal law appeared in 1908 under the editorship of the late Henry Warburton. In the present edition Mr. Grundy has preserved the leading features of the work both in the arrangement of the cases and in the character of the notes. He has left the one hundred and thirty-seven leading cases just as they appeared in the fourth edition, but he has added to the notes on the leading cases a considerable number of other cases by way of summary abstracts. The notes indeed have been carefully revised, and, in some instances, even re-written; while the index has been enlarged and improved. The aim of the present editor has been, as it was also that of the late Mr. Warburton, to make the collection "a handbook for practitioners as well as for students." In the case of any legal text-book or collection of cases, this double aim is always a difficult one to carry out successfully, for practitioners and students are, after all, two distinct groups of readers with different purposes and needs. The present collection is as successful as most books prepared on these lines.

The editor of the collection may perhaps desire to consider two or three suggestions when he comes to prepare a future edition. In the first place, the list of leading cases ought to be revised. Some of the cases now placed in that category might well be relegated to the notes and some of the cases now considered in the notes might properly be given a more prominent place among the leading cases. In the second place, the editor should consider the desirability of revising the abstracts of some of the leading cases, for they are at present too short to be of much value either to the student or to the practitioner. It would also be an advantage if the very words of the reporter could be more often reproduced. An editor's abstract of a case, even though it may be good, never quite takes the place of the language employed by the reporter himself. Fortunately

the editor of the present volume reproduces extracts from the Judges' opinions *ipsissimis verbis*. In the third place, the existing four divisions of the collection—namely, (1) general principles; (2) offences more particularly against the state, and offences against the person; (3) offences against property; and (4) criminal procedure—need reconsideration with the object of introducing a more critical and scientific arrangement of the cases under a considerable number of headings and subheadings. Dr. Kenny's collections of cases on crimes, torts, and contracts are in this as in other respects models which deserve careful study by other editors who consider the needs of students. In the fourth place, the editor might expand somewhat his many lists of cases introduced by the words "other cases on this subject are." A mere list of other cases may be of some use to the practitioner, but it has no meaning to the student, who will not take the trouble to look up such cases without more inducement. The points and principles of the cases that are of interest might be indicated in each instance by a few words in brackets. This would encourage the student to take down the reports of some of the cases from their shelves and to peruse them.

The present edition contains references to only five of the statutes bearing on criminal law and procedure which have been enacted since the accession of George V. There is no mention of the Official Secrets Act, 1911, the Criminal Law Amendment Act, 1912, the Protection of Animals Acts, 1911 and 1912, the Bastardy Act, 1914, and the Criminal Justice Administration Act, 1914. The last Act to which the editor refers is the Larceny Act, 1916.

H. D. H.

The Principles and Practice of the Civil Code of Japan. By J. E. de Becker, LL.B., D.C.L. London: Butterworth & Co. 1921. xxix and 853 pp. (£3.)

Messrs. Butterworth and Co. are to be congratulated on publishing this excellent and interesting work. It will be essential to every student of Japanese life and contemporary history.

It will be equally interesting to the student of comparative law. Dr. de Becker has done more than merely translate the Japanese Civil Code. He has compared it, in the most scholarly manner, both with the French, German, and Swiss codes, and with English law. To make this comparison easier he has provided a table which shows the corresponding articles of the French, German, and Swiss Civil Codes.

The learned author has also given frequent citations of decisions of the Japanese Courts, and thus, as he has stated in his modest preface: "A careful study of the book will enable the enquirer to comprehend the underlying principles and philosophy of what may not inappropriately be termed the 'Common Law' of Japan."

Although the first four books, dealing with property, obligations, contracts, &c., are of interest to the reader, it is particularly in the last two books that the student of Comparative Law will find the richest material. Chapter VIII, dealing with "Houses," has been particularly brilliantly handled by the author. His introductory paragraph, as emphasizing the importance of "Houses" in Japanese law, is worthy of quotation: "In Europe, where individualism largely obtains, the fact of

people living together in a house is a mere matter of fact and does not necessarily involve a question of law; but in Japan—or rather in the East in general for that matter—where 'ancestor-worship' (sosen reihai) has long held sway and feudal conceptions still continue to make their influence felt, 'houses' or families still play an important rôle in the same way in which they did in early Roman times in the West."

The laws dealing with marriage and divorce emphasize in a striking manner the importance of the family in Japanese law. Thus, Article 772, 1, reads: "A child (under 30 years of age, if a man, or under 25 years, if a woman) must obtain the consent of his or her father and mother belonging to the same house." In discussing judicial divorce Dr. de Becker says in part: "Judicial divorce can be demanded in the following cases only (Art. 813):— . . . 7. If one party is ill-treated or greatly insulted by a lineal ascendant of the other party,—a provision directed against the exacting ill-natured father and mother-in-law, with whom it is often the lot of the Japanese bride to live. 8. If a lineal ascendant of one party is ill-treated or grossly insulted by the other party—a cause of divorce peculiar to Japan, where 'filial piety' is supposed to be the very virtue of virtues."

It is to be hoped that the success of the present volume will encourage Dr. de Becker to continue his services to the cause of Comparative Law by publishing a similar book on the Criminal Law of Japan.

A. L. G.

The Pocket Law Lexicon. Revised by Leonard W. J. Costello, M.A., LL.B., Cantab. Fifth edition. London: Stevens & Sons, Lim. 1921. 447 pp. (10*s.* net.)

The present edition of this popular work is tastefully bound and excellently printed on good paper. It is unfortunate that the matter it contains is not of the same high standard. Many of the definitions are either incorrect or else so vague as to be of no value. Thus "Crime" is defined as "the violation of a right when considered in reference to the evil tendency of such violation, as regards the community at large. It includes felony and misdemeanour." This, of course, is Blackstone's well-known definition, but, since Austin's criticisms, it has been recognized as incorrect, and the one that is accepted nowadays can be found in Professor Kenny's *Outlines of Criminal Law*, page 15, which reads: "Crimes are wrongs whose sanction is punitive and is remissible by the Crown if remissible at all."

"Tort" is defined as follows: "Injury or wrong. Actions are divided into actions on contract, actions on tort, and actions on tort arising out of contract." This, of course, is both meaningless and incorrect, because there are many wrongs, in the correct acceptation of the term, which are not torts. The division of actions given here has at least the charm of novelty.

"Reversion" is defined by the learned editor as "that portion left of an estate after a grant of a particular portion of it has been made to another person by the owner or reversioner; *e.g.* on the creation of a term of years out of a fee there is a right of reverter in the grantor, so that the fee returns to him on the determination of the term." This is reminiscent

of the answer of the student to the question: "What is an incorporeal hereditament?" He replied: "It is a right issuing out of real property, *e.g.* a tree."

The Dictionary might advantageously be shortened by the omission of considerable irrelevant information. The purpose of a law dictionary is to define legal terms, and such a section as the following should be omitted: "Bicycles are now 'carriages' within the meaning of the various Highway Acts, by virtue of s. 85 of the Local Government Act, 1888. By the same section they are compelled to carry lights between one hour after sunset and one hour before sunrise, and to sound a bell, or whistle, etc., on overtaking carriages, etc., or foot-passengers."

On the other hand, certain essential words are omitted, *e.g.*, "Ownership"; and the word "Owner" is merely defined as follows: "Owner has a statutory meaning under the Public Health Act, 1875 (see s. 4), and under the Factory and Workshop Act, 1901 (see s. 156 (1))."

At the end, the book contains a valuable list of the law reports with their abbreviations.

A. L. G.

Cases on the Common Law. By the late Ernest Cockle and W. Nembhard Hibbert, LL.D. (Lond.). London: Sweet & Maxwell, Lim. 1921. xxxiv and 991 pp. (£2 2*s.* net.)

This book will be found of great value by students and practitioners of the law. It contains almost every important case on the common law, and can be used for reference when there is not sufficient time to go to the Law Reports direct.

The editors' notes, while excellent summaries of the law, are less valuable, as a case book should not attempt to be also a text-book. The black type which is freely used to emphasize the various points made by the Judges might well be omitted in the next edition, as it tends to prevent the student from using his own intelligence in reading the cases.

In including such a vast number of cases in a single volume, the editors have been forced to cut down the amount of quotation from the judgments, and in some cases this is unfortunate. Thus, in their report of the famous case of *Coggs* v. *Bernard*, Lord Holt's enumeration of the six sorts of bailments has been so abbreviated that it is of slight value to the student. Only eight lines are given to the case of *Merry* v. *Green*, and the facts as stated in the headnote do not sufficiently emphasize the point at issue. In the next edition the learned editors might be well advised to leave out some of the less important cases, and to put greater emphasis on the essential ones. By trying to include too much, they may find themselves in the position of the circus proprietor who advertised that he was exhibiting the smallest giant in existence. The citations may be too short to be of real value in a book primarily designed as a collection of authorities.

A. L. G.

The Law of Income Tax with the Income Tax Acts appended. By E. M. Konstam, K.C. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1921. xlviii and 519 pp. (35*s.* net.)

This book will be found not only essential by the practising barrister and solicitor, but also of interest and value to the tax-payer. The learned author has written in such a lucid manner that the ordinary business man will be able to understand the "obscurity of the Income Tax Acts."

Mr. Konstam has not satisfied himself by merely citing the decided cases, but has discussed their effect and, at times, even ventured criticisms. Where an important point has not been settled he has expressed his opinion as to what the correct answer should be. Thus on p. 283 he summarizes the important case of *Inland Revenue Commissioners* v. *Blott*, which deals with bonus allotment of shares, and gives his views concerning a possible case where an option to take payment in cash in lieu of such shares is offered by the company. The *Blott Case* has been decided by the House of Lords since the book was published, but no change will have to be made in the author's statement of the law.

It is a pleasure to find so elaborate and intelligent an index as this book contains. One of the first requirements of a good text-book is to enable the reader to find the law he wishes with a minimum of effort—a fact which many authors forget when they have once finished their text.

We have further received from publishers the following books, each of which we think a person desiring information on the particular topic dealt with will find most useful:—

The Agricultural Holdings Acts. By Aubrey J. Spencer. Sixth edition. London: Stevens & Sons, Lim. (12*s.* 6*d.* net.)

This edition was unfortunately passed for press, as is stated in a note preceding the Preface, before the enactment of the Corn Production Acts (Repeal) Act, 1921, which repealed the Corn Production Act, 1917, and Part I of the Agricultural Act, 1920, excepting certain powers with respect to the destruction of injurious weeds conferred by section 13 of the Act of 1917 and section 4, sub-section 10 of the Act of 1920. This circumstance will, however, scarcely be a trap for readers, as few will be unaware of it. The book gives a large class of persons just the knowledge which they require of the law affecting persons engaged in agriculture.

The Finance Act, 1894, *and Subsequent Legislation.* By John Eustace Harman, M.A., Bencher of Lincoln's Inn. Fourth edition. London: Stevens & Sons, Lim. 1921. xix and 272 pp. (7*s.* 6*d.*)

The last edition of this valuable book was published in 1910. Since that date the Finance Act of 1914 has abolished settlement estate duty and

made other important changes in the law. As a result the author has been enabled to shorten the present edition to a considerable extent. In an able introduction the various death duties now chargeable are set forth, and a short summary of their history is given. In the main body of the book the Finance Act, 1894 (57 & 58 Vict. c. 30) is printed in full. Each section is elaborately annotated with citations of recently decided cases. The notes of the learned author are clear and have the added value that examples are given wherever the point is a difficult one.

Analysis of Williams' Law of Real Property. By A. M. Wilshere. Fourth edition. London: Sweet & Maxwell, Lim. (7*s.* 6*d.* net.)

This will be found most useful in the final stages of preparation by those unfortunates who are expected to be able to honour at sight a demand for any of the numerous statements of fact compactly presented by Williams.

Indermaur's Epitome of Common Law Cases. By Ernest A. Jelf, M.A., with illustrations by E. T. Reed. Tenth edition. London: Sweet & Maxwell, Lim. 1922. xviii and 111 pp. (8*s.* 6*d.* net.)

A book which has reached its tenth edition can plead the law of prescription against a critic who might doubt the wisdom of making pemmican of sixty-two leading cases by reducing them to 104 pages of a small volume. But a considerable number of students are evidently in need of taking their legal nourishment in tabloid form, and they will find this packet capable of easy absorption without taxing a weak intellectual digestion. We suggest that in the next edition the verses attached to Mr. Reed's delightful illustrations be cut out or rewritten. They are (with the exception of a quotation from Sir F. Pollock) of the feeblest description.

Hunter, Introduction to Roman Law. New edition revised and enlarged by A. F. Murison, M.A., LL.D. London: Sweet & Maxwell, Lim. 1921. xii and 222 pp. (10*s.* net.)

Professor Murison has given us a welcome revision of this useful book. We know of none more reliable for rough clearing of the ground with a view to cultivate the details of Roman law. The exposition is so clear, and technical terms are so well explained, that not only the law student, but also the layman desirous of knowing something of Roman law will find it profitable. We have but one regret to express, and that is the omission of the index.

A Compendium of the Law of Torts. By Sir Hugh Fraser, M.A., LL.D. Tenth edition. London: Sweet & Maxwell, Lim. 1921. xxxiv and 287 pp. (12*s.* 6*d.* net.)

Our first acquaintance with Sir Hugh Fraser's little book was with its fifth edition in 1902, and he is to be congratulated on steadily avoiding the temptation to spoil it by unduly enlarging it. There has been a wise omission in this edition of anything except a bare reference to the Workmen's Compensation Acts. The book is, and always has been, helpful to candidates for the Bar Final Examination.

A Manual of the Law of Evidence. By Sidney L. Phipson, M.A. (Cantab.), Barrister-at-Law. Third edition. London: Sweet & Maxwell, Lim. 1921. xxxvii and 239 pp. (12*s.* 6*d.*)

The student reading for the Law Tripos, and especially for the Bar Examination, will find this book of the greatest value. It covers all the more important questions arising under the Law of Evidence, and is so clearly written that the reader is never confused. In most other summaries of law the attempt to be short leads to the sacrifice of clarity. Moreover, the numerous examples given by the author to illustrate his text will be of great value to the student in helping him to remember the various rules. A reviewer hesitates to make suggestions where the book is as admirable as the present one, but we believe that it could be improved by the inclusion of short statements giving the history of, and reasons for, the various rules. Such additions would be of value both for their own sake as meeting many examination questions and also as a help to the student in remembering the rules themselves.

The Law of Torts. By Arthur Underhill, M.A., LL.D., of Lincoln's Inn, Barrister-at-Law. Tenth edition, by A. C. Hagon, B.A., LL.B., of the Inner Temple, Barrister-at-Law. London: Butterworth & Co. 1922. lxii, 294 and 32 pp. (14*s.* net.)

This elementary book on the law of torts is written in a way that might well be copied by writers on other branches of the law. In many textbooks the student is confronted with long statements of the law, and often he searches in vain for the principles on which these statements are based. The system used in this book aims at teaching the student principles and their application to problems. A principle is stated, careful explanation of it follows, and numerous illustrations from decided cases show its actual application.

The editor announces that the Articles on Dangerous Premises, Escape of Dangerous Things (including Animals), Wilful Torts of Servants,

Circulating Dangerous Chattels, and Damage Caused by the Act of a Third Party, have been rearranged and partly rewritten. Recent cases have been added, bringing the book up to date. In connexion with cases, it would be convenient to add the date of the case to its quotation in the text, thus saving the reader the necessity of continually referring to the index of cases.

The Articles on the Relation of Tort and Contract, Damages, Common Employment, and Employers' Liability, are particularly useful. There is also a very useful Article on the Workmen's Compensation Acts, a topic on which but little information is given in ordinary text-books.

The Article on the Definition of Fraud might have been much clearer and fuller, and less might have been said in the Article on Assault, where the author takes an excursion into criminal law.

The Articles on *Damnum Sine Injuria* and Contributory Negligence are exceedingly brief. The Article on Slander of Title and Slander of Goods should not be discussed under the heading of Defamation; they are torts of quite another species, and are analogous to Deceit.

On the whole, the book furnishes a clear and concise exposition of the law of torts, and will be especially useful to students.

H. B.

The Sale of Goods Act, 1893, *including the Factors Acts*, 1889 *and* 1890. By Sir M. D. Chalmers. Ninth edition. London: Butterworth & Co. 1922. xlii, 200 and 42 pp. (15s.)

The merits of this well-known standard commentary on the Sale of Goods Act, 1893, by the draftsman of the Act, are so well known that very little need be said in its praise. The book is a very able discussion of the Act. Each section is set out in full, and is followed by explanation illustrated from decided cases on the interpretation of the section.

The issue of a new edition of this very useful work has been justified by the large number of important commercial cases of 1920 and 1921 which illustrate points in the interpretation of the Act. Very few of these cases, however, receive any considerable amount of discussion, the author contenting himself with brief statements of the facts and the decisions, the seeker after knowledge being left to discover the principles of the decisions for himself.

The references to standard text-books on the Law of Personal Property and the general Law of Contract should be brought up to date; they refer to editions of many years ago and are practically useless to a student.

The illustrations from decided cases are particularly useful in helping the student to an understanding of the application of the Acts.

H. B.

An Annotated Edition of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. London: "Law Notes" Publishing Office. (3*s*. 6*d*. net.)

THE editors of *Law Notes* have rendered a real service to those who have to be acquainted with this temporary legislation by furnishing them a guide to the all too numerous decisions arising out of it which encumber the reports. The introduction will be found particularly useful by lawyers who, not being constantly concerned with the application of the Act, require to refresh their memory as to its scope. As the law stands at present, the Act remains in force until June 24, 1923.

The "Law Notes" Year-Book, 1921, being an alphabetical guide to the Statutes, Rules, Orders and Cases of the Year. London: "Law Notes" Publishing Office. (4*s*. 6*d*. net.)

THIS book has been compiled at the suggestion of readers who benefited from the "Refresher" pamphlet issued by the editors for the information of ex-Service solicitors at the end of the war. If the experiment proves successful a similar book will be published annually. We hope that it will be strongly supported. Such a publication must be very helpful to hard-worked solicitors, and is a real boon to a teacher, keeping him abreast of current developments in those branches of the law in which he is not a specialist.

How to become a Barrister. By GIBSON and WELDON, Law Tutors. London: "Law Notes" Publishing Office. (4*s*. 6*d*. net.)

THIS little book has reached the third edition. Law teachers who are consulted by students on this subject cannot do better than advise them to procure this book. It gives details of the procedure and fees, of the prizes and studentships obtainable at the several Inns of Court, and of the various examinations. Candidates for the latter are assisted by lists of books recommended, and by an appendix containing questions set at a recent examination, with skeleton answers.

How to become a Solicitor. By GIBSON and WELDON, Law Tutors. London: "Law Notes" Publishing Office. (4*s*. 6*d*. net.)

THIS companion volume to the above-mentioned book will be in equally great demand. In addition to a clear statement of all the preliminary information necessary to one who contemplates entering this branch of the profession, there are a few valuable pages with regard to prospects in that career. It is interesting to observe that in the opinion of the authors a

law degree often assists the possessor of it to obtain professional advancement.

Emmett's Notes on Perusing Titles. Ninth edition. London: Solicitors' Law Stationery Society, Lim. (20*s.* net.)

THIS work, first published in 1895, was designed to be a practical book by a solicitor in practice for other solicitors in practice. Its utility is proved by the number of the subsequent editions.

We think that it will be found useful, not merely by the class of persons for which it was intended, but also by students who are aiming at distinction in an examination on conveyancing and have already made a careful study of one of the standard text-books. It will help them to test their knowledge by putting problems before them from a different angle.

Dymond's Death Duties. Third edition. London: Solicitors' Law Stationery Society, Lim. (21*s.* net.)

IN the preface to the first edition in 1913 the author, Mr. Robert Dymond, of the Estate Duty Office, Somerset House, said that his object was to put the law dealing with all death duties into a compact form for the benefit of both lawyer and layman. The success with which he has performed his melancholy task is evidenced by the fact that his book has established itself permanently in the literature on this subject. It is probably more useful to lawyers than to laymen. We suggest that in a future edition the author should increase its helpfulness to the latter class by amplifying the introduction in such a way as to give actual or expectant property owners a survey of those matters on which they are likely to require information.